U.S. DEPARTMENT OF COMMERCE
National Technical Information Service

PB-253 909

A Collection of Legal Opinions. Volume I

Environmental Protection Agency

September 1975

KEEP UP TO DATE

Between the time you ordered this report—which is only one of the hundreds of thousands in the NTIS information collection available to you—and the time you are reading this message, several *new* reports relevant to your interests probably have entered the collection.

Subscribe to the **Weekly Government Abstracts** series that will bring you summaries of new reports *as soon as they are received by NTIS* from the originators of the research. The WGA's are an NTIS weekly newsletter service covering the most recent research findings in 25 areas of industrial, technological, and sociological interest—invaluable information for executives and professionals who must keep up to date.

The executive and professional information service provided by NTIS in the **Weekly Government Abstracts** newsletters will give you thorough and comprehensive coverage of government-conducted or sponsored research activities. And you'll get this important information within two weeks of the time it's released by originating agencies.

WGA newsletters are computer produced and electronically photocomposed to slash the time gap between the release of a report and its availability. You can learn about technical innovations immediately—and use them in the most meaningful and productive ways possible for your organization. Please request NTIS-PR-205/PCW for more information.

The weekly newsletter series will keep you current. But *learn what you have missed in the past* by ordering a computer **NTISearch** of all the research reports in your area of interest, dating as far back as 1964, if you wish. Please request NTIS-PR-186/PCN for more information.

WRITE: Managing Editor
5285 Port Royal Road
Springfield, VA 22161

Keep Up To Date With SRIM

SRIM (Selected Research in Microfiche) provides you with regular, automatic distribution of the complete texts of NTIS research reports *only* in the subject areas you select. SRIM covers almost all Government research reports by subject area and/or the originating Federal or local government agency. You may subscribe by any category or subcategory of our WGA **(Weekly Government Abstracts)** or **Government Reports Announcements and Index** categories, or to the reports issued by a particular agency such as the Department of Defense, Federal Energy Administration, or Environmental Protection Agency. Other options that will give you greater selectivity are available on request.

The cost of SRIM service is only 45¢ domestic (60¢ foreign) for each complete microfiched report. Your SRIM service begins as soon as your order is received and processed and you will receive biweekly shipments thereafter. If you wish, your service will be backdated to furnish you microfiche of reports issued earlier.

Because of contractual arrangements with several Special Technology Groups, not all NTIS reports are distributed in the SRIM program. You will receive a notice in your microfiche shipments identifying the exceptionally priced reports not available through SRIM.

A deposit account with NTIS is required before this service can be initiated. If you have specific questions concerning this service, please call (703) 451-1558, or write NTIS, attention SRIM Product Manager.

This information product distributed by

NTIS U.S. DEPARTMENT OF COMMERCE
National Technical Information Service
5285 Port Royal Road
Springfield, Virginia 22161

176038

PB 253 909

a COLLECTION of LEGAL OPINIONS

volume I

REPRODUCED BY
NATIONAL TECHNICAL
INFORMATION SERVICE
U. S. DEPARTMENT OF COMMERCE
SPRINGFIELD, VA. 22161

DECEMBER 1970 – DECEMBER 1973

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of General Counsel
Washington, D.C. 20460

BIBLIOGRAPHIC DATA SHEET

1. Report No.
EPA-GC-75-01

2.

3. Recipient's Accession No.
PB253909

4. Title and Subtitle

A COLLECTION OF LEGAL OPINIONS
December 1970 - December 1973 Vol. 1

5. Report Date
Date of Issue-Sept. 1975

6.

7. Author(s)
Office of General Counsel

8. Performing Organization Rept. No.

9. Performing Organization Name and Address
United States Environmental Protection Agency
Office of General Counsel, A-130
Washington, D. C. 20460

10. Project/Task/Work Unit No.

11. Contract/Grant No.

12. Sponsoring Organization Name and Address
Environmental Protection Agency
Office of General Counsel
401 M Street, S. W.
Washington, D. C. 20460

13. Type of Report & Period Covered
Final
December 1970 - Dec.1973

14.

15. Supplementary Notes

Subsequent volumes will appear.

16. Abstracts

This volume is a collection of the more significant Environmental Protection Agency legal opinions which were written by the attorneys in the Office of General Counsel from EPA's formation in December 1970 through December 31, 1973.

Statutes which are interpreted include the Clean Air Act of 1970, the Federal Water Pollution Control Act (FWPCA), the Noise Control Act, the Solid Waste Disposal Act, the National Environmental Policy Act and the Federal Pesticide Control Act of 1972.

17. Key Words and Document Analysis. 17a. Descriptors

Environmental Protection Agency
legal opinions
Clean Air Act
Federal Water Pollution Control Act
Federal Pesticide Control Act
Noise Control Act
National Pollution Discharge Elimination System
Solid Waste Disposal Act
National Environmental Policy Act
Freedom of Information Act

17b. Identifiers/Open-Ended Terms

PRICES SUBJECT TO CHANGE

17c. COSATI Field Group

18. Availability Statement
Release Unlimited

19. Security Class (This Report)
UNCLASSIFIED

20. Security Class (This Page)
UNCLASSIFIED

21. No. of Pages
641

22. Price
$16.25

INTRODUCTION

This collection of Environmental Protection Agency legal opinions from 1971 to 1973 represents the more significant legal opinions which have been written by our attorneys in the Office of the General Counsel from EPA's formation in December, 1970, through December 31, 1973. Subsequent opinions will be released in annual updates.

The Clean Air Act of 1970 launched a comprehensive program to establish abatement requirements for sources of air pollution around the country. To implement this Act, EPA was first directed to establish national ambient air quality standards for various air pollutants. The States were then required to prepare plans for the implementation of these air quality standards; these plans had to be approved, disapproved or modified by EPA. In addition to the national ambient air standards which establish the control mechanism of existing sources, the Clean Air Act provides for emission standards for pollutants emitted by new sources (such as a newly-built power plant or a cement factory). The Act also set up an accelerated schedule for the abatement of automobile pollution.

The Federal Water Pollution Control Act (FWPCA) was enacted in order to "enhance the quality and value of our water resources and to pollution." The Act requires EPA to regulate the discharge of pollutants from "point sources" into our nation's waters. Under the Act, no pollutants may be discharged from point sources, primarily industrial plants, municipal treatment plants and agricultural feedlots, without a permit containing discharge limitations and clean-up schedules.

Because the primary responsibility for cleaning-up the nation's waters is left to the States, Congress authorized numerous grants to aid the States in their pollution abatement efforts. These grants provide assistance to States for research and development, manpower training, water quality training and monitoring and enforcement. The major financial thrust of the Federal effort, though, is directed toward municipalities for the construction of sewage treatment plants.

In October, 1972, the Federal Pesticide Control Act (FEPCA) was signed into law. This Act amended the provisions of the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (FEPCA), which was essentially a labelling scheme focusing its attention primarily on the licensing of pesticide products intended for interstate shipment. FEPCA requires the registration of any pesticide with EPA and prohibits the distribution, sale, shipment, delivery or receipt of an unregistered pesticide.

Our lawyers in the General Counsel's Office have the challenging and exciting job of interpreting these statutes, which form the major basis of EPA's statutory authority. The Office of the General Counsel is still small by government standards. It was built gradually by the cautious selection among the hundreds of applicants attracted to this new Agency with its new challenge. I think it safe to say that our lawyers have won the respect of our "clients" - the program offices - and of the public. I believe the caliber of the opinions which follow demonstrates that these lawyers skillfully handled difficult and varied questions of law -- often under severe time pressures -- and that the respect they enjoy is well deserved.

Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel

HEADQUARTERS GENERAL COUNSEL STAFF

Assistant Administrator for Enforcement and General Counsel #	Alan G. Kirk II

Christopher Smith*
Frank J. Sizemore III

Deputy General Counsel	Robert V. Zener
Associate General Counsel for Water	G. Willian Frick

Thomas Bastow
Alan W. Eckert
Jeffrey H. Howard
Ray E. McDevitt
Pamela P. Quinn
James A. Rogers
Nancy L. Speck
Robert J. McManus
Alan N. Kosloff
Daniel M. Joseph*
Thomas H. Truitt*
Sherwood S. Willard*
Richard Laster*
Carol A. Cowgill*
Michael B. Gross*
Edward Krause*

Associate General Counsel for Air Quality And Radiation	Michael A. James+

John E. Bonine
Leslie C. Carothers
Richard J. Denney, Jr.
Gerald K. Gleason
William F. Pedersen, Jr.
Richard G. Stoll, Jr.
Jeffrey H. Schwartz*
Rodney G. Snow*

Associate General Counsel for Pesticides and Solid Waste Management	Anson M. Keller

Timothy L. Harker
John C. Kolojeski
Edward W. Lyle
Anthony Garvin
Ronald L. McCallum
Taylor O. Miller
William Reukauf
George A. Robertson
Michael C. Farrar*
Charles B. Fielding*
Thomas H. Kemp*
Eileen M. Stein*

Associate General Counsel for Grants, Contracts and General Administration	Joan E. Odell

Anthony G. Beyer
Benjamin H. Bochenek
Richard C. Boehlert
Henry K. Garson
Edward C. Gray
Donnell L. Nantkes
Norval D. Settle
Joseph M. Zorc
Frank G. E. Tucker*

REGIONAL COUNSELS

I	Thomas B. Bracken
II	Peter B. Devine
III	Joseph Manko
IV	Orin G. Briggs
V	Harvey Sheldon
VI	Thomas P. Harrison
VII	John H. Morse
VIII	James W. Sanderson
IX	Cassandra Dunn
X	Theodore R. Rogowski

NOTE: °John R. Quarles, Jr., now EPA's Deputy Administrator, was the Assistant Administrator for Enforcement and General Counsel from December, 1970, to April, 1973. During this period, Mr. Alan G. Kirk served as Deputy General Counsel.

+Robert L. Baum, now Deputy Assistant Administrator for General Enforcement, was Associate General Counsel for Air Quality and Radiation

*No longer with the Agency

CONTENTS PAGE

INTRODUCTION i
HEADQUARTERS GENERAL COUNSEL STAFF iii
REGIONAL COUNSELS iv

SECTION

I. AIR 1
  A. IMPLEMENTATION PLANS 1
    1. Section 110 of the Clean Air Act -- Implementation Plans 1
      a. Implementation of Section 110 1
      b. EPA Options 5
      c. Approval of State Implementation Plans 9
      d. Submissions to EPA of Alterations and Changes in the Implementation Plans 11
      e. Status of Existing Regulations in State Implementation Plans 12
      f. Pre-construction Review Authority Required for Implementation Plans 14
      g. Time Period for Attainment of the National Standards 16
      h. Variance and Compliance Schedules 16
      i. Postponement of an Implementation Plan 18
      j. Extension of Compliance Dates for Individual Sources Beyond Attainment Dates 20
      k. Necessity of Public Hearings on Compliance Schedules 25
      l. One-Year Postponement Under §110(f) 29
      m. Number of Postponements Which May be Granted Pursant to Section 110 (f) of the Clean Air Act 43

2. Transportation Control Plans.................................. 45

a. Transportation Control Plans.............................. 45

b. Legal Authority to Promulgate and Enforce Transportation Controls.................................. 50

c. Legal Authority to Require State and Local Officials to Submit Compliance Schedules for Transportation Controls.... 68

d. EPA Brief in Suits Challenging Disapproval of Implementation Plans.................................. 70

B. STATIONARY SOURCES.. 77

1. Section 111 of the Clean Air Act -- Standards of Performance for New Stationary Sources.................... 77

a. Nondegradation -- Federal Authority........................ 77

b. Applicability of New Source Performance Standards to Source Modifications........................... 80

c. Resumption of Operations by Sources........................ 82

d. New Source Performance Standards for Asphalt Batch Plants.. 83

e. Applicability of New Source Standards to Asphalt Plants....... 84

f. Authority to Proscribe Processes........................... 85

g. Delegation of Authority 88

h. Standards upon which State Emission Standards Must be Based... 93

i. Federal Performance and Hazardous Emission Standards --State Enforcement..................................... 96

2. Section 112 of the Clean Air Act -- National Emission Standards for Hazardous Pollutants................... 98

a. EPA's Authority to Establish an Ambient Concentration Standard.................................... 98

3. Section 113 of the Clean Air Act -Federal Enforcement......... 101

a. Enforcement Orders.................................. 101

b. Enforcement of Short-Term Violations of Implementation Plans.................................. 107

c. Employment of Enforcement Procedures in Concert with National Hearing on Feasibility of Sulfur Oxides Control Technology for Coal Fired Electric Power Plants......... 109

4. Section 114 of the Clean Air Act -- Inspections, Monitoring and Entry........................ 127

a. Requirements Under Section 114.......................... 127

b. Fifth Amendment Limitations on Use of Section 114........ 128

c. Delegation of Authority to Make Emission Data Public...... 136

d. Monitoring of Ambient Air.............................. 137

e. Ambient Air Quality Monitoring by EPA.................. 141

C. MOBILE SOURCES 143

1. New or Restored Engines in Old or Restored Vehicles (Section 213)...................................... 143

2. Replacement Engines for Installation in Vehicles of Prior Model Years.. 145

3. Emission Control Systems................................ 146

a. Modification of Emission Control Systems or Devices (Section 203).................................. 146

b. Lead Emissions from Motor Vehicle Exhaust (Sections 202, 211, 110) 148

c. Trade Secret Information and Suspensions of the 1975 Auto Emission Standards (Section 202(b)(5)......... 149

d. Warranty Repairs on Emission Control Systems (Section 207)... 151

e. Replacement of Catalytic Converters (Section 206(a)....... 153

f. Sulfuric Acid Particle Emissions from Vehicles Equipped with Platinum Catalysts........................ 155

3. Shipment of Uncertified Vehicles............................ 158

4. Authority to Compel Auto Manufacturers to Conduct Tests...... 161

5. Requiring Manfacturers To Submit Developmental Vehicles for Testing.. 166

6. Certification of Three-Quarter Engines....................... 167

7. Heavy-Duty Engines.. 169

a. Standard Setting for "Low-Emission Vehicles with Heavy-Duty Engines (Section 212).................. 169

b. Information Requirements -- Heavy-Duty Engine Manufacturers (Section 208)...................... 174

8. Warranties and Maintenance Under Section 207............... 175

9. Approval of Maintenance Instructions as Prequisite to Sale..... 181

10. Section 207 of the Clean Air Act and Related Provisions....... 182

11. Certificate of Conformity -- Section 206.................... 191

a. Duration of Certificate of Conformity..................... 191

b. Certification of Vehicles for Sale at High Altitudes......... 194

12. Availability of Lead-Free Gasoline to Independent Retail Marketers... 197

13. Exportation of Vehicles to Canada (Section 203)............... 199

14. Tampering... 201

15. Tampering Violations under §203(a)(3) of the Clean Air Act.... 209

D. COMPLEX SOURCES.. 212

1. Complex Sources... 212

E. AIRCRAFT.. 216

1. Applicability of Clean Air Act and Executive Order 11507 to Publicly-Owned Aircraft.......................... 216

2. Administrators's Certification: Airport and Airways Act...... 219

F. FUEL AND FUEL ADDITIVES.............................. 222

1. Authority to Regulate Fuels and Fuel Additives.............. 222

2. Registration and Regulation of Fuels and Fuel Additives...... 223

3. Regulation of Lead as a Fuel Additive...................... 229

4. Regulation of Lead and Phosphorus Content of Gasolines..... 232

5. Reproposal of Proposed Lead Regulations.................. 236

6. Preemption of Municipal Lead Additive Controls Under The Clean Air Act.............................. 239

G. EMERGENCY ACTION.................................. 244

1. Emergency Authority (Section 303)........................ 244

2. Definition of "Imminent Endangerment" (Section 112)......... 246

H. AIR: GENERAL.. 248

1. Information Gathering Under the Clean Air Act -- Necessity for OMB Clearance............................ 248

2. Payment of Costs Awarded to Successful Litigants Under the Clean Air Act................................ 250

II. NOISE.. 253

A. NOISE CONTROL ACT OF 1972 253

1. EPA Enforcement Responsibilities.......................... 253

2. Definition of "Best Available Technology.................... 256

3. Authority of EPA under Section 4(c) (Authority Administrator to Coordinate and Review Federal Regulations Relating to Both Environmental and Occupational Noise................ 260

4. Health and Welfare Criteria for Section 18.................. 263

5. Pre-emption.. 265

III. RADIATION 275

A. ENVIRONMENTAL RADIATION 275

1. Definition of "Generally Applicable Environmental Radiation Standards" 275

IV. WATER 276

A. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 276

1. Interpretation of the Federal Water Pollution Control Act Amendment 276

2. Technical Comments on S. 2770 278

3. Meaning of the Term "Navigable Waters" 295

4. Meaning of Best Practicable Waste Treatment Technology 296

B. NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM (PERMIT PROGRAM SECTION 402) 302

1. The Statutory Background and Legislative History 302

2. Permit Program Under Section 402 316

3. Policy Guidance 318

a. Application of the Fish and Wildlife Coordination Act to the Issuance of Permits 318

b. Changes in Effluent Limitations or Water Quality Standards -- Do They Constitute a Change in Permitted Discharge 320

c. Increase in Production and NPDES Permits 321

4. State Permit Programs 324

a. Division of Authority 326

b. May State Permit Programs Continue to be Operated Without an Approved Program 327

c. Regulations Which Must be Promulgated Prior to Submission of Attorney General's Statement in Connection with Approval of State NPDES Programs 329

- d. State Permit Program Authorities -- Civil and Criminal Penalties 330
- e. Federal vs. State Water Permits.................................... 332
- f. Ability of States to Enforce Federally Issued NPDES Permits.................................... 333
- g. Extent of EPA Approval of State Issued NPDES Permits...... 334
- h. Conflict of Interest.................................... 337

5. Effluent Guidelines 342
    - a. Authority for EPA to Issue Discharge Permits Prior to Publication of Effluent Guidelines under Section 304........ 342
    - b. Revision of Permits Upon later Issuance of Guidelines for Effluent Limitations under §304............... 343
    - c. Effluent Limitations to be Applied to Industrial Dischargers Now Applying Better Treatment than Effluent Guidelines Require.................................... 345
    - d. Must Effluent Guidelines Establish a Range.................. 346
    - e. Section 316.................................... 350

6. Scope of Permitting Authority.................................... 351
    - a. FWPCA, Section 306(d) - 10 Year Grace Period............. 351
    - b. Applicability of Permit Program to Storm Sewers............ 352
    - c. Authority to Exclude Point Source from Permit Program.................................... 354

7. Public Access to Information.................................... 357
    - a. Comparability of Public Participation and Information Procedures in Permit Program and Under NEPA........... 357
    - b. Confidentiality of Effluent Data........................... 360

C. WATER QUALITY STANDARDS.............................. 362

1. Disapproval of Overly Stringent State Standards............... 362

2. Issuance of Discharge Permits Based upon Proposed Water Quality Standards.................................... 363

3. Objections of a Downstream State under Section 401(a)......... 364

4. Enforcement of Water Quality Standard......................... 365

5. Revision of Applicable Water Quality Standards................ 367

6. Revision of Water Quality Standards........................... 369

D. DRINKING WATER STANDARDS.............................. 372

1. Legal Review of Task Force Report.......................... 372

2. Legal Review of Task Force Report--Drinking Water Standards.. 373

E. OIL AND HAZARDOUS SUBSTANCES.............................. 380

1. Outer Continental Shelf; Applicability of FWPCA............... 380

2. Control of Oil Pollution.................................... 382

a. State May Impose its own Sanctions Against Discharge of Oil into Waters Situated within its State................ 382

b. Control of Pollution from Offshore Facilities.............. 383

3. Oil Sheen and Equipment Regulations......................... 388

4. Oil Removal Authority....................................... 390

F. OCEAN DUMPING AND MARINE SEWAGE.......................... 391

1. Request for Ocean Dumping Permit............................ 391

2. EPA Jurisdiction with Respect to Floating Nuclear Power Plants.. 392

G. VESSEL WASTE.. 394

1. Vessel Sewage Regulations Under the FWPCA................... 394

a. Federal Pre-emption of Marine Sanitation Device Standards.. 394

b. Effective Date of No-Discharge Regulations................ 395

c. The size of No-Discharge Areas.......................... 397

d. Definition of Navigable Waters.......................... 400

2. Vessel Sewage Regulations Under FWPCA, Amended........... 408

a. No-Discharge Exemption from the Federal Vessel Sewage Standard under Section 312(f)(3)............. 408

b. Interpretation of Section 312 -- Vessel Sewage Regulations... 409

H. THE REFUSE ACT'S PERMIT PROGRAM....................... 411

1. Proposed Corps Regulations Concerning Permit Program Hearings... 411

2. Army Corps of Engineer's Proposed Regulations Governing Permit Program Hearings Where a Downstream State has Objected Pursuant to Section 21 (b)(2) and(4) of FWPCA........ 415

3. Confidentiality Clause in Permit Program Application Form...... 417

4. Legal Basis for Effluent Guidelines......................... 419

5. Legal Requirements Necessary to Obtain Abatement of Pollution Under Section 10(c)(5), FWPCA..................... 422

6. Effluent Guidelines and the Permit Program.................. 424

7. Effluent Guidelines -- Suggested Amendment to Preamble....... 425

I. ENFORCEMENT CONFERENCES................................ 429

1. Enforceability of Recommendations of the Administrator of EPA following an Enforcement Conference Authorized under Section 10, FWPCA.......... 429

V. PESTICIDES.. 431

A. OPINIONS BASED ON FEDERAL ENVIRONMENTAL PESTICIDE CONTROL ACT (1972) (FEPCA)................................ 431

1. Implementation of FEPCA................................... 431

2. Authority to Regulate Advertising of Pesticide Products.......... 439

3. Experimental Use Permits................................... 444

4. Must a Request for an Advisory Committee be Automatically Granted in Pending Cancallation Proceedings.................. 445

B. OPINIONS BASED ON FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT.................................. 448

1. Advisory Committee's Release of Submission Transcripts........ 448

2. Section 14(a) of FIFRA and Abbreviated Hearing................ 449

3. Must EPA Require a Foreign Registrant to Designate a Domestic Agent.................................... 451

4. DDT Administration Litigation.................................. 452

C. PESTICIDE ACCIDENT SURVEILLANCE SYSTEM................ 454

1. Implementation of the Pesticide Accident Surveillance System... 454

VI. GRANTS AND CONTRACTS.. 462

A. CONSTRUCTION GRANTS.. 462

1. Federal Water Pollution Control Act Funds 462

a. Disaster Relief.. 462

2. Title II Construction Grant Funding......................... 465

a. Appropriations in Title II Construction Grant Program..... 465

b. Funding for Projects under Section 208(f) 467

3. Sewage Treatment Works Construction Funds Under FWPCA, Amended.. 470

a. Availability of Sewage Treatment Works Construction Funds.................................... 470

b. Allotment of Funds for Construction of Sewage Treatment Works............................... 472

c. Availability of Unallotted Portions of Construction Grants Contract Authority for FY 1973 and 1974................. 475

d. Use by Minnesota of Unexpended FY 1972 Program Grant Funds.. 476

e. Funding Under Delaware's "Phased" System............... 478

f. Funding Under Delaware's Phased Grant System 479

g. Advanced Construction Grant Authority Pursuant to Section 206(f).......................... 485

h. Industrial Waste Construction Cost Recovery............ 486

4. Great Lakes Area Treatment Works Projects.................. 488

5. Use of Revenue Sharing Funds for Waste Treatment Projects.. 492

B. SOLID WASTE GRANTS.. 494

1. Grants to States under the Solid Waste Disposal Act, as Amended.. 494

2. Solid Waste Disposal Act-- Granted Support for Site Surveys.. 495

C. AIR GRANTS.. 497

1. Use of Local Funds on Air Pollution Control Program Grants... 497

2. Consolidation of Air Program Grants within a State.......... 500

D. GRANTS: OTHER.. 503

1. Legal Review of EPA Contracts and Grants................. 503

2. Use of Other Federal Grant Funds to Meet EPA Matching Requirements.. 504

E. CONTRACTS... 508

1. Authority to Contract for Paid Advertising................... 508

2. Proposed Contracts for Obtaining an Advertising Campaign... 509

3. Contracts for Dissemination of Information or Encouragement of Citizen Action........................ 512

4. Patent Rights Clause (What Rights are Retained by Government and its Contracted Company in the Course a Proposed EPA Contract with the Company.......... 515

VII. OPINIONS AFFECTING THE GENERAL ADMINISTRATION OF EPA. 520

A. AGENCY MANAGEMENT AND PERSONNEL.................... 520

1. Reimbursement of Personnel Travel Expenses 520

a. Reimbursement of Travel Expense from Non-Federal Sources.................................. 520

b. Legality of International Organizations or Foreign Countries Paying EPA Employee's Expenses............. 521

2. Payment of EPA Employees' Travel Expenses by the Federal Republic of Germany......................... 523

3. Visitors' Releases and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities.. 525

4. EPA Utilization of Foreign Scientists........................ 530

5. Voluntary Services for EPA.................................. 534

6. EPA's Use of an Advertising Agency for the Purpose of Publicizing Polluters........................... 543

B. CIVIL RIGHTS.. 545

1. Compensation for a Witness at an Agency Hearing........... 545

VIII. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)............. 547

A. APPLICATION OF NEPA TO ACTIVITIES OF EPA............. 547

1. Application of NEPA to Activities of EPA.................. 547

2. Application of National Environmental Policy Act to Permit Program--Number of Impact Statements Required........... 552

3. Section 309 of the Clean Air Act -- Environmental Impact Review.. 554

4. NEPA Aspects of the Award and Administration of EPA State and Local Assistance Grants................. 557

5. Applicability of NEPA to "Four Corners Project"............ 567

6. Four Corners-- Application of NEPA to Interiors review of Air Pollution Control Equipment......................... 569

7. Air Pollution Control Equipment--Four Corners Generation Station... 570

B. ENVIRONMENTAL IMPACT STATEMENTS....................... 572

1. CEQ's Guidelines for Preparation of Environmental Impact Statements.. 572

2. Comments on Draft Environmental Impact Statements -- Legal Consequences of Request for Additional Information 574

3. Necessity of Environmental Impact Statement when Issuing a Discharge Permit to a "New Source"............... 575

C. NEPA -- SUMMARY OF MAJOR DECISIONS.................. 577

1. Summary of Major Decisions.............................. 577

2. Calvert Cliffs Decision.................................. 579

3. Environmental Impact of Nuclear Power Plants Relationship between AEC and EPA....................................... 580

IX. THE FREEDOM OF INFORMATION ACT 582

A. RELEASE OF INFORMATION 582

1. Release of Information in Regional Office Files............... 582

2. Requests for Information from Members of Congress......... 584

B. TECHNICAL INFORMATION.................................. 585

1. Status of Technical Information Provided EPA by Private Companies....................................... 585

C. AUDIT REPORTS... 588

1. Public Availability of Audit Reports......................... 588

D. INTERPRETATION OF THE FREEDOM OF INFORMATION ACT AND THE FEDERAL ADVISORY COMMITTEE ACT............. 590

1. Applicability of the Freedom of Information Act and The Federal Advisory Committee Act to Meetings of Subcommittees 590

E. CONFIDENTIALITY OF INFORMATION......................... 593

1. Tapes of Advisory Committee Meetings...................... 593

2. Confidentiality of Trade Secret Information Obtained under Section 211 ("Regulation of Fuels") of the Clean Air Act...... 594

3. Confidentiality of Fuel Additive Information................. 596

4. Confidentiality of Information Obtained Pursuant to S. 210 of the 1967 Clean Air Act --Federal Employees not Concerned with Carrying Out the Act................................ 607

5. Protection of Process Data as Trade Secrets.................. 609

X. TAX AND ANTI-TRUST.. 612

A. TAX.. 612

1. EPA Guidelines Under I.R.C. Section 169................... 612

2. Certification of Pollution Control Facilities Eligible for Accelerated Amortization Under Section 169 of the Internal Revenue Code.. 613

3. Eligibility of Solid Waste Compaction Facilities for Rapid Amortization Under Section 169 of the I.R.C. 619

B. ANTI-TRUST... 620

1. Anti-trust Exemption for Pollution Control................. 620

SECTION I AIR

IMPLEMENTATION PLANS

SECTION 110 OF THE CLEAN AIR ACT -- IMPLEMENTATION PLANS

TITLE: Implementation of Section 110

DATE: April, 30, 1973

MEMORANDUM OF LAW

FACTS

Your memorandum of February 27, 1973, to Robert Baum raises several questions involving subjects discussed at the Regional Administrators' meeting on power plants. All of the questions are concerned with EPA's overseeing of State implementation plans.

QUESTION #1

If a State has an approved emission regulation which is more stringent than necessary to attain the national standards but refuses to enforce its emission regulation by obtaining compliance schedules from regulated sources, may EPA reject the State emission regulation and promulgate a less restrictive measure that provides for the attainment of ambient air quality standards?

ANSWER #1

Where EPA has approved a State emission regulation as part of an applicable plan and the State does not enforce the regulation, EPA's responsibility under the Clean Air Act is to enforce the approved emission limitation and, in so doing, the Agency must provide for compliance with the approved emission limitation.

DISCUSSION #1

It is helpful to begin with a general discussion of EPA's authority and responsibility under §§110 and 113 of the Act, since most of the questions raise basic problems of interpretation of those sections. It is important to recognize that we are discussing two separate functions, viz approval/promulgation and enforcement.

EPA's authority to promulgate implementation plan regulations stems from the disapproval of regulations submitted by the State, or by the failure of the State to submit necessary regulations. If State regulations are approved by EPA, the Agency has no authority to promulgate different regulations. Under the law, EPA must approve regulations which are more stringent than those needed to meet the national standards. Once these regulations are approved, there is no authority to promulgate less stringent regulations. This is true even if a State fails to enforce these regulations.

With regard to the second function raised by the questions, i.e., enforcement, EPA is given clear authority to enforce approved implementation plans or plans promulgated by the Administrator. As we have previously pointed out, under §110(d), for purposes of the Clean Air Act ". . .an applicable implementation plan is the implementation plan, or most recent revision thereof which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State." The words "applicable implementation plan" are in this case, words of art. Section 113 authorizes Federal enforcement of an "applicable implementation plan." Accordingly, it is clear that it is only approved or promulgated plans which EPA may enforce.

As you know, the submission by a State with regard to regulations and compliance schedules is really two separate submissions. On one hand, EPA evaluates the emission limitations to make certain that they are sufficient to achieve the national standards. If the degree of reduction is sufficient, that emission standard is approved. Many State plans contain provisions by which they are required to procure a compliance schedule subsequent to the adoption and submission of the emission standard. Failure to obtain the compliance schedules in no way affects the validity of the approved emission regulations. Accordingly, EPA does not have authority to promulgate a different emission regulation. What is left to EPA is the authority to procure compliance schedules which meet the applicable implementation plan, in this case, the emission limitations submitted by the State and approved by EPA.

QUESTION #2

When imposing Federal compliance schedules or approving State compliance schedules for sources subject to approved State emission regulations which are more stringent than necessary to attain the national standards, must EPA require compliance with the approved regulation or may it impose or approve instead whatever less stringent requirements are necessary to achieve the national standards?

ANSWER #2

Unless the State revises its approved regulation and obtains EPA approval of that revision, both the State and EPA are bound by the approved regulation when obtaining or approving compliance schedules.

DISCUSSION #2

The premise of your second question is that the State has submitted emission limitations which are more stringent than necessary to achieve the national ambient air quality standards. The issue is whether if a State submits a compliance schedule or we have to procure one, can we accept or procure one which will achieve the standards or must we accept or procure one which meets the State emission regulations. This situation is similar to the first one discussed above. The applicable plan contains an emission limitation which is the only guide for the preparation and approval of compliance schedules. Quite aside from the requirements of §110, a different answer would put EPA in the position of approving or trying to secure a compliance schedule to meet an emission limitation which does not exist, except in EPA files. More specifically, even if it were possible to try to adopt or procure compliance schedules to meet some number less stringent than that approved in the plan, exactly what that number would be in each case would be subject to question and litigation. We should point out that if the State has in fact adopted emission limitations which are more stringent than necessary to meet the national standards, they can submit a plan revision with more lenient requirements if they still conform with the requirements of the Act.

QUESTION #3

Is a change in control strategy by a State (e.g. from a firm emission limitation to a system of intermittent control, tall stacks, and/or some other measures) to be considered a plan revision?

ANSWER #3

Yes. This action would constitute a substantive modification of the regulatory scheme which carries out the control strategy to provide for attainment and maintenance of the national standards.

DISCUSSION #3

The change in question would involve the regulatory requirements applicable to a source or class of sources. Emission limitation requirements are the most critical parts of any plan and are specifically required to be included in the plan by §110(a)(2)(B) of the Act. It is axiomatic that a substantive modification of such requirements must be considered a plan revision.

QUESTION #4

May States revise an approved plan requirement because of the difficulty or impossibility of sources meeting that requirement? Where a State makes such a determination, may it now apply for an extension of the statutory attainment date for the national standards?

ANSWER #4

A State may revise an implementation plan requirement in the situation described, if the plan as modified will still provide for the attainment of the relevant national standards within the attainment date set forth in the plan approval. If the revision to a plan requirement would necessitate postponing the date specified for attainment of national standards, a revision for that purpose is also possible under the Act so long as the date is as expeditious as practicable and does not extend beyond mid-1975. Either type of revision would have to be approved by EPA.

DISCUSSION #4

Where the State, in negotiating compliance schedule with individual sources, determines that compliance with the approved emission regulation by a source or sources will be difficult or impossible by the prescribed compliance date, it may revise its plan with respect to that source or sources. A source may be granted a variance from the initially-applicable compliance date if compliance is required to be as expeditious as practicable (40 CFR 51.15(b)) and the compliance date does not extend past the prescribed attainment date for the national standards. Any extension of compliance past that date would require a postponement under §110(f) of the Act (40 CFR 51.32(f)).

Alternatively, the State may reassess the control strategy and choose to revise its emission regulations to reflect the non-availability of technology or other control measures (e.g. low sulfur fuels), if the revised regulations will still provide for attainment of the national standard within the prescribed attainment date. The State may also set back the attainment date for a national standard if the new date is no later than mid-1975 and the plan demonstrates that the new date represents attaining the national standard as expeditiously as practicable.

QUESTION #5

May EPA approve implementation plan provisions which utilize stack height requirements for emission dispersion in lieu of measures requiring limitation of emissions?

ANSWER #5

As noted in your memorandum, this question is now being considered by the Court in the National Resources Defense Council suit challenging EPA's approval of the Georgia plan, and we feel it is appropriate for us to defer any action on the question until the Court makes a decision.

DISCUSSION #5

As you may be aware, a briefing package on the stack height limitation issue is being prepared for the Administrator's consideration.

QUESTION #6

Does the Act allow a State to revise a plan by adopting emission regulations adequate to attain the national standards but less stringent than those approved by EPA or to rescind emission regulations resulting from a reclassification of a region from Priority I to Priority III?

ANSWER #6

Yes, provided the State demonstrates to the Administrator's satisfaction that the less stringent regulations provide for the attainment of the relevant national standards as expeditiously as practicable, but no later than mid-1975. In the case of regional reclassification, the Administrator could approve the recission based on a determination that the controls are not necessary since the national standard (NO_2) is being attained. Where the standard is being attained only marginally, however, recission of all NO_x controls may threaten maintenance of the standard and necessitate the Administrator's disapproval of all or part of the recission.

DISCUSSION #6

In our view, §110 did not require States in the preparation of their plans to make faultless judgments with respect to the practicability of controlling sources and attaining the national standards. Reassessments and consequent revisions to plans are approvable by the Administrator so long as the revised plan demonstrates attainment of the national standards as expeditiously as practicable (but no later than mid-1975). As noted in #4 above, in the case of individual source compliance schedules (including variances), the source must be required to comply as expeditiously as practicable (40 CFR 51.15(b)).

The unavailability of low sulfur fuels is an appropriate factor for consideration in determining the practicability of control, both as applied to individual sources (in compliance schedule development) and to attainment dates.

It should be noted that the Agency is currently engaged in litigation with the Natural Resources Defense Council over the question of relaxation of plan requirements, through either granting of variances or other regulatory revisions. NRDC argues that the only permissible means of postponing plan requirements is pursuant to §110(f) of the Act, the provision for one-year postponements upon specific findings by the Administrator on the record of a formal hearing.

§ § § § § § §

TITLE: EPA Options

DATE: February 8, 1973

BACKGROUND

Your memorandum of January 22, 1973, identifies problems with the availability of low-sulfur fuels and flue gas cleaning equipment which threaten to impair the ability of some States to carry out their implementation plans to attain and maintain national ambient air quality standards. In general you point out the need to apportion available clean fuels and sulfur-removal hardware so that some States do not obtain their clean air at the expense of others, especially where measures more stringent than necessary to meet the national primary standards are involved in some States, while attainment of the primary standards is jeopardized in other States. Considerable uncertainty exists as to the extent to which EPA may, within the constraints of the Clean Air Act, control State action in the utilization of these resources vital to sulfur dioxide control.

QUESTION #1

May EPA grant a one-year delay of compliance for a source which has made good faith efforts but cannot obtain clean fuel or a scrubber by mid-1975, even though the delay would result in a failure to attain a national primary ambient air quality standard by that date?

ANSWER #1

Such a delay may be granted if the requirements of §110(f) of the Act and 40 CFR 51.32 are met.

DISCUSSION #1

Section 110(f) was introduced in the 1970 Clean Air Amendments by the Conference Committee.[1] It is clearly separate from and in addition to §110(e)'s provision for extending for two years the three-year attainment date for national primary standards, and there is nothing in its terms or its legislative history to indicate that it does not authorize a delay in compliance where the result would be a failure to meet the standard by mid-1975 (or mid-1977 where a two-year extension was already in effect).[2] The section specifically conditions the one-year postponement on the Administrator's determination that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health" ((f)(1)(C)). Since the primary standard would protect the public health if achieved, there was no need for Congress to be concerned with interim measures to protect public health unless the postponement would interfere with the achievement of the primary standard. The net effect of the section is to permit deferral for up to one year of the achievement of the standard provided the conditions in the paragraph are met and such steps as are feasible are taken to minimize the impact on public health.

As interpreted and applied by the Agency under 40 CFR 51.32(f), 110(f) would not come into play unless the proposed postponement would interfere with the attainment of a national standard within the time specified in the plan.

We should emphasize that EPA may only grant a one-year postponement if the Governor of the State applies to the Administrator and after the Administrator holds a formal hearing under paragraph (f)(2)(A), makes a fair evaluation of the entire record of the hearing, and makes a statement setting forth the findings and conclusions required by paragraph (f)(1).

QUESTION #2

May EPA disapprove implementation plan compliance schedules which are designed to improve air quality in areas already achieving national primary standards?

---

[1] The provision had no counterpart in the House bill, but the Senate bill included a provision allowing U. S. District Courts to extend for one year (with renewals allowed) the deadline for attainment of a primary standard, upon petition by the Governor of a State.

[2] The Senate Conferees explained the effect of §110(f) in their "Discussion of Key Provisions", as follows:

> "A Governor may also apply for a postponement of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan...." 116 CONG. REC. 20600 (daily ed. Dec. 18, 1970).

ANSWER #2

There is no legal basis on which EPA could reject either compliance schedules or plans which achieve ambient air quality levels more stringent than that required by the Clean Air Act or which achieve the levels required by the Act sooner than necessary under the law.

DISCUSSION #2

The operative language of §110 is that the Administrator shall approve any implementation plans which are consistent with the requirements of the Act. As you are aware, we have argued in other contexts that there is no real discretion in the Administrator either to require more than is set forth in the Act or to permit the States to do less than that which the Act requires. Specifically, §110(a)(2)(A)(i) requires that each State's plan provide for attainment of the primary standards "as expeditiously as practicable" but no later than mid-1975 (except under a §110(a) extension). The legislative emphasis was clearly on speedy protection of public health, and the determination as to practicability is clearly the State's. As you are aware, §116 of the Act reserves to States the rights to have more stringent standards than required by the Clean Air Act. This of course would include the right to achieve those or national standards sooner than mid-1975 and would include the right to achieve such standards in an unreasonably short length of time.

There is simply no provision of the Act which we could point to to provide legal support for rejection of schedules or plans which complied with the requirements of §110. A review of the legislative history fails to reveal any reference to the situation which you describe, namely, where the aggregate effect of the implementation plans is to create a shortage of fuel or abatement equipment which is likely to result in some areas not being able to meet the primary standards while other areas use these resources where they could meet the primary and perhaps even the secondary standards without them.

While there is certainly justification for telling all of the States that their aggregate efforts create a situation in which individual time schedules become "unreasonable", failure to approve the schedules in accordance with the Act does not appear to be warranted and from a practical point of view, would undoubtedly create a great deal of disruption. In this connection the Administrator's disapproval under the law is to be followed by promulgation of appropriate measures. It would be very difficult to argue that appropriate measures are those which are less stringent than those which the States submitted. Failure to take any action would not ease the situation since it would leave the State regulations in effect but since they were not approved by EPA would deprive EPA of any enforcement power over that portion of the State plan.

QUESTION #3

May EPA approve variances extending beyond 1975-76 to State implementation plan regulatory requirements in areas (1) which are meeting primary but not secondary standards, if the date in the plan for achieving secondary standards is reset beyond 1975-76? (2) which are already achieving secondary standards?

ANSWER #3

(1) Yes, but the resetting of the attainment date must also be approved by EPA in accordance with the requirements of 40 CFR 51.13(b).

(2) Yes.

DISCUSSION #3

The Act's requirement that secondary standards be achieved within a "reasonable time" has, in the case of sulfur dioxides, been interpreted and applied by EPA regulations to mean that where the application of "reasonably available control technology" will achieve the standards, they must be met by mid-1975, unless the State shows that good cause exists for not applying that technology (40 CFR 51.13(b)). The regulations (40 CFR 51.1(o)) provide a basic definition of "reasonably available control technology" as meaning the controls and techniques which will provide for the emission limitations in Appendix B to Part 51, but qualify that by stating that Appendix B's emission limitations should not be adopted without considering "the social and economic impact of such emission limitations, and....alternative means of providing for attainment....of such national standard". Presumably, either of these issues would provide a basis for the "good cause" showing mentioned above.

Except with respect to highly industrialized areas, most of the State plans specify attainment of the secondary standards for sulfur dioxide by mid-1975, because either the State or EPA prescribed that date. (Plans for attainment of the secondary standards in many problem areas have not yet been finalized, due to EPA granting of 18-month extensions under §110(b)). Postponement of these attainment dates will constitute plan revisions which will have to be approved by EPA after public hearings. such approval will have to be consistent with the requirements of EPA regulations discussed above. "Good cause" showings that specific fuels and/or hardware are not available in fact in a given area would, in our view, provide supportable grounds for a postponement. Obviously, there is a significant distinction between the availability in a developmental sense of a type of control system or technique and the actual availability in the marketplace of that control or the means to effectuate that technique.

If it is determined that the Agency's regulations do not provide the States adequate flexibility in setting reasonable dates for attainment of the secondary standards, EPA may amend its regulations to allow greater flexibility. The language and legislative history of §110 make clear that Congress did not place the same emphasis on achieving the secondary standards as it did on the attainment of the primary standards. In any case, it is clear that EPA may not compel the States to defer attainment of the secondary standards or even more stringent State standards, although it may encourage them to do so.

In areas where secondary standards are already achieving secondary standards, the emissions from existing sources have been included in the calculations establishing that the standards are being attained. If States grant variances to those sources which would allow them to continue to emit at existing levels beyond 1975-76, EPA may approve the variances because there would be no added emissions involved which could threaten maintenance of the standards. The construction of new sources of a pollutant already being emitted does, of course, raise the threat of failure to maintain the standards. Provisions for dealing with new sources in clean areas are, however, adequately included in implementation plans in accordance with the requirements of 40 CFR 51.18 that new source construction be prohibited if it will "interfere with the.... maintenance of a national standard."[3]

QUESTION #4

May EPA approve a request by a State for a two-year delay in achieving primary standards under §110(e)? This request would be on the basis of new evidence that alternatives to comply with the Act (e.g., clean fuels) are not available?

ANSWER #4

We have previously taken the view that the two-year extensions may be granted if they are requested prior to February 15, 1973. This view is currently being reexamined in light of the recent decision in NRDC v. Ruckelshaus, and we will advise you as to any changes.

§ § § § § § §

TITLE: Approval of State Implementation Plans

DATE: February 3, 1972

FACTS

Your memorandum of December 4, 1971, to Donald Mosiman, Assistant Administrator for Air and Water Programs, takes issue with Mr. Edward Tuerk's statement that the Clean Air Act prohibits the Administrator from delegating the authority to approve State implementation plans to Regional Administrators. Mr. Mosiman's office has asked that we respond, since an interpretation of the Act is involved.

QUESTION #1

Does the Clean AirAct permit the Administrator to delegate the authority to approve State implementation plans?

---

[3] Depending upon the final outcome of Sierra Club v. Ruckelshaus in the U. S. Supreme Court, EPA may be required to require State plans to include not only this protection of national standards, but also protection against significant degradation of air quality in areas already meeting secondary standards.

ANSWER #1

Approval of implementation plans is rule making which §301(a) of the Act provides may not be delegated by the Administrator.

DISCUSSION

1. The relevant language of §301(a) of the Act is as follows:

> "The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations, as he may deem necessary or expedient." [emphasis added]

The underlined language encompasses all "rule making" by the Administrator which the Administrative Procedure Act (5 U.S.C. 551) defines as "agency processes for formulating, amending or repealing a rule". The term "rule" is further defined to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...."

2. We conclude that the Administrator's action in approving a plan or a portion or revision thereof falls within the quoted definition. EPA approval (or disapproval) is required under §110 and, therefore, clearly implements the Act. The effects of approval are prospective and its applicability may be said to be both general and specific within the region or State involved.

3. One way of identifying agency action as rule making is to look to the legal consequences which flow from it. By approving a State's regulation which is part of a plan, the Administrator essentially adopts the regulation as a Federal rule, thereby establishing the basis for EPA enforcement action should the State default in enforcement.*/ We think that §110 does not contemplate, nor would we expect courts to accept, Federal request for criminal penalties and injunctive relief against sources on the basis of some informal EPA action not having the status of an agency rule.

4. While we conclude that approval is rule making, it is our opinion that a notice of proposed rule making may be dispensed with, on the ground that public involvement in the formulation of the plan makes notice unnecessary.

---

*/ The alternative to EPA approval is EPA promulgation of a substitute Federal regulation. §110(c)

§ § § § § § §

TITLE: Submission to EPA of Alterations and Changes in the Implementation Plans

DATE: February 7, 1972

FACTS

Your memorandum of January 19, 1972 to Mr. Baum in which you asked if it would be permissible for the State air pollution control agencies to submit to EPA corrections to the implementation plans required to make the plans approvable, has been referred to me for response. You have correctly noted that the implementation plan regulations at 40 CFR 51.5 require the Governor of each State to submit his State's implementation plan.

ISSUE

Do changes and alterations in State implementation plans, which are not revisions of rules, regulations and compliance schedules and which will be submitted prior to approval of the plan, have to be submitted to EPA by the Governors?

ANSWER

Changes in implementation plans not constituting revisions specified at 40 CFR 51.6(c) and (d) (revisions of rules, regulations and compliance schedules) and which are submitted prior to approval of the plan do not have to be submitted to EPA by the Governor. Such changes may be submitted to EPA by the State air pollution control agencies.

DISCUSSION

1. Section 110 of the Act does not require that the Governor of each State submit the implementation plans.1/ However, the implementation plan regulations do impose this requirement.2/

2. The regulations appear to require the Governor to submit all revisions or changes to a plan. Revisions are changes in applicable (approved) plans. These changes with which you are concerned are minor amendments to submitted but not yet approved plans, and are not to be considered revisions

---

1/ Section 110(a)(1) provides

> Each State shall...adopt and submit to the Administrator...a plan...

Section 110(a) requires that the Governor of each State make the application for the two-year extension of the three-year period. It cannot be inferred, however, that this section requires the Governor to submit the plan.

2/ 40 CFR 51.5

within the applicable regulations. Consequently, the State air pollution control agencies may be permitted to submit to EPA alterations to submitted but not yet approved plans. It is advisable, however, to continue to have the Governors submit changes which, if submitted after approval of an implementation plan, would constitute a revision of a rule, regulation or compliance schedule.

3. This opinion should not be interpreted as relieving any State from the obligation of complying with the formal requirements for "adoption" of an implementation plan or any portion thereof.

§ § § § § § §

TITLE: Status of Existing Regulations in State Implementation Plans

DATE: October 4, 1971

FACTS

In a September 16, 1971, memorandum to Mr. Robert Baum, of this office, Mr. Terry Stumph of Region IX discussed the problem of certain States in submitting existing regulations to public hearings prior to inclusion in the State's implementation plan. Your September 27, 1971, memorandum to Mr. Baum, which references Mr. Stumph's memorandum, concedes that existing regulations must be subjected to public hearings, and discusses the necessity for readoption of these existing regulations in order to include them in the implementation plan.

QUESTIONS

1. Does section 110 require public hearings on existing regulations?
2. Does section 110 require readoption of existing regulations?

CONCLUSION

Unless the regulations are part of an implementation plan adopted and submitted to the Secretary, DHEW, under the provisions of the Clean Air Act prior to the enactment of the 1970 amendments, they must be subjected to a public hearing. However, readoption of these regulations is not necessary for them to be included in the implementation plan.

DISCUSSION

1. Section 110(a)(1) specifically provides that implementation plans under that section shall be submitted to the administrator only after "reasonable notice and public hearings." The necessity for such hearings is reiterated throughout the section. The Administrator must approve a plan if it meets certain requirements and if he determines that it was adopted after reasonable notice and hearing. Section 110(a)(2). Revisions of implementation plans likewise

may be adopted only after hearings. Section 110(a)(3). If a State fails to submit an approvable implementation plan, the Administrator is to promulgate a plan but only after review of the public hearings or, if none were held, after the Administrator conducts such hearings. Section 110(c).

2. The legislative history makes clear that the hearings requirement reflects the Congress' belief that public hearings are essential to the success of implementation plans. "Any implementation plan could be developed for a region only after participation by the public. Public participation can only be meaningful if there is reasonable notice and full disclosure of information prior to public hearings." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970). "Reasonable notice must be given of, and public hearings held on, any proposed plan." 1/ H. Rep. No. 91-1146, 91st Cong., 2d Sess. 8 (1970). 2/

3. The only existing regulations which are expressly exempted from the hearings requirement are those which are included in a plan adopted and submitted prior to the enactment of the 1970 amendments to the Act. The savings provisions contained in section 16 of the Act provide that such plans shall remain in effect if they meet the requirements of the amended Act. The Congress could have provided such an exception for other regulations which had previously been examined by the public at hearings, but it did not. We think no basis exists for additional exemptions.

4. Our conclusion concerning the necessity for hearings does not, however, compel the conclusion that States must readopt existing regulations which are included as part of an implementation plan. While all regulations included in a plan must be in effect when the plan is submitted to the Administrator for approval, neither the Act nor its legislative history contain any indication that Congress contemplated readoption of existing regulations prior to adoption of an implementation plan. 3/ Such a step would be a useless formality, inconsistent with the desire of the Congress for prompt action in formulating the plans. Thus, while the States must subject their present regulations to public discussion with reference to their inclusion in the plan, once the decision is made to include them in the plan, the Clean Air Act does not require that these regulations go through the complete rule-making process.

1/ Note that the proposed plan is viewed as a whole, whether it contains existing regulations or proposed regulations, or both.

2/ See also Senator Muskie's remarks stressing the importance of public involvement. 116 Cong. Rec. 20597-98 (daily ed. December 18, 1970)

3/ "Adoption" of an implementation plan means adoption by appropriate means, i.e., legislative, rulemaking, or policy, of the laws, regulations, and procedures which together comprise the plan. Separate enactment of the plan, as an entity, is not required.

§ § § § § § §

TITLE: Pre-construction Review Authority Required for Implementation Plans

DATE: February 2, 1972

FACTS

In your January 19, 1972, memorandum to the Assistant General Counsel, Air Quality and Radiation Division, you pointed out that EPA's regulations for preparation, adoption, and submittal of implementation plans contain provisions which appear to be inconsistent and possibly without legal justification. Accordingly, you have requested our opinion on the proper interpretation of these regulations.

QUESTION #1

Does section 110 of the Clean Air Act provide authority for EPA to require that implementation plans contain legally enforceable procedures for preconstruction review and approval of construction or modification of all significant stationary sources?

ANSWER #1

Since section 110 requires the States to submit a plan which contains measures necessary to insure attainment and maintenance of national air quality standards, there is general authority for EPA to require review and control of construction of all sources if this procedure is deemed essential.

QUESTION #2

What information is required under 40 CFR 51.18(c) to determine if a control strategy is violated?

ANSWER #2

This information should be the same as that necessary to determine whether construction or modification will result in attainment or maintenance of a national standard.

DISCUSSION

1. 40 CFR 51.11(a)(4) requires that each implementation plan show that the State has legal authority to

> prevent construction, modification or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard.

40 CFR 51.18(a) requires that in connection with the above legal authority

> [e]ach plan shall set forth legally enforceable procedures that will be used to implement the authority described in section 51.11(a)(4), which procedures shall be adequate to enable the State to determine whether construction or modification of stationary sources will result in

violations of applicable portions of the control strategy or will interfere with attainment or maintenance of the national standard.

2. The legal authority regulation (section 51.11(a)(4)) does require a State to be able to control construction or modification of all sources. Although Congress, in section 110(a)(2)(D) and 110(a)(4), specifically required this authority only with respect to new sources subject to section 111, there is justification for the broader requirement under the general purpose of section 110 and specifically under section 110(a)(2)(B). The overall intent of section 110 is to provide a plan which will permit attainment and maintenance of national ambient air quality standards. While section 110(a)(2) does include certain specific items which the Congress said would be necessary to reach this goal, it also provided flexibility in section 110(a)(2)(B) which states that the plan shall be approved if it includes "such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standards, including, but not limited to, land-use and transportation controls". Accordingly, the Agency may require by regulation those elements of a plan which it believes necessary to insure attainment and maintenance of any national standard. In prescribing section 51.11(a)(4) of the regulations, the Agency was implementing its determination that control of the location, construction, and modification of sources other than those now covered under section 111 would be necessary to insure attainment and maintenance of the national standards. It is difficult to imagine anything more destructive of a program designed to protect air quality than the unsupervised introduction of significant new sources of pollution to an air quality region.

3. As pointed out above, section 110 clearly contemplates that land-use controls will be necessary. Since source location control is directly concerned with land-use, we feel that there is express support in that section for requiring this type of control.

4. The relationship between the two regulations cited above presents a different problem. The scope of section 51.18(a) is a function of the scope of section 51.11(a)(4). The regulation cannot compel the State to set forth procedures to accomplish something which the State is not required to do under 51.11(a)(4). That section only requires the State to prevent construction, modification, or operation of a source where that source will interfere with attainment or maintenance of the national standard. However, even though section 51.11(a)(4) does not mention "control strategy", we cannot identify any substantive difference in the two sections. A control strategy, as defined in 40 CFR 51.1(n), refers basically to emission controls. We do not, therefore, foresee any situation where information concerning the control strategy would not also be pertinent to the effect of the construction or modification on the attainment or maintenance of a national standard. Of course, should there be information which in fact does only affect decisions regarding the control strategy, the problem of having to reject a plan for failure to provide the procedures required by the regulation would arise. We believe it would be appropriate to amend section 51.18(a) to conform with section 51.11 but this problem should not interfere with the development and approval of State implementation plans.

§ § § § § § §

TITLE: Time Period for Attainment of the National Standards

DATE: December 10, 1971

FACTS

Pursuant to §110(e) of the Clean Air Act, on application of a governor at the time of submission of an implementation plan, the Administrator may, after making certain determinations, extend the 3-year period for achievement of the primary standards for up to two additional years.

ISSUE

If, pursuant to §110(c), the Administrator must promulgate an implementation plan for a State, does he have the option of promulgating a plan which incorporates the 2-year extension, or must the EPA plan provide for the attainment of the standards within the 3-year period?

ANSWER

Upon the making of the requisite determinations under §110(e), an implementation plan promulgated by the Administrator may provide for up to five years for the achievement of national primary standards.

DISCUSSION

By including provisions for the 2-year extension in the Clean Air Act, Congress recognized that in certain regions the attainment of the national standards would be impossible within three years. Accordingly, Congress included in the law a mechanism by which, under prescribed circumstances, up to two additional years could be given to the State to achieve the standards. Whether or not a State submits an approvable implementation plan is irrelevant to the question of how long a period is necessary for achievement of the standards. Thus, although the Act does not specifically cover the point, there can be no doubt that in situations where, if a State had submitted a request for the extension and it would have been granted, the Administrator's plan may itself extend the time for achievement of the standards.

§ § § § § § §

TITLE: Variances and Compliance Schedules

DATE: February 4, 1972

FACTS

In the process of reviewing implementation plans, OGE has raised questions regarding the situation where a State grants a variance to a compliance schedule which is part of an applicable implementation plan.

ISSUE #1

If a State grants a source or class of sources a variance from an EPA approved compliance schedule, does that variance constitute a revision of the implementation plan within the meaning of the regulations (40 CFR Part 51)?

ANSWER #1

Yes. Any altering or adjusting of an approved compliance schedule which defers the applicability of part of an approved control strategy will constitute a revision of the implementation plan.

ISSUE #2

As a procedural matter, what must the State do before a variance can be approved?

ANSWER #2

As required by §110(a)(3), any variance must be the subject of a public hearing.

DISCUSSION

1. OGE has asked if the implementation plan regulations require that a variance to an approved compliance schedule be subjected to a public hearing. This office has concluded that the regulations do not clearly state that as a requirement, and that their failure to do so is an omission which must be corrected in order to make the regulations internally consistent with §110 of the Act.

2. Each State is required to submit compliance schedules to EPA as part of its implementation plan. 1/ These compliance schedules may either be submitted at the time the plan is submitted or as soon as possible thereafter but no later than 45 days after the end of the first complete semiannual period following approval of the implementation plan, i.e., February 15, 1973. 2/ A compliance schedule may be included in a control regulation or it may be individually negotiated with a source. The Administrator may disapprove any compliance schedule if such schedule does not provide for attainment of the national primary standards as expeditiously as practicable. 3/

3. The status of variances to approved compliance schedules is addressed in §51.32(f) (request for one-year postponement) of the regulations as follows:

> A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attain-

---

1/ 40 CFR 51.15

2/ 40 CFR 51.15(a)(1) and (2); 40 CFR 51.7

3/ 40 CFR 51.15(b). In the case where a compliance schedule is disapproved, EPA must promulgate one pursuant to §110(c) of the Act.

> ment or maintenance of a national standard within the time specified in such plan: provided, however, that any such determination will be deemed a revision of an applicable plan under §51.6. [emphasis added]

"Control strategy", defined at 40 CFR 51.1(n), includes compliance schedules. 4/ Because a variance to any approved compliance schedule defers the applicability of a control strategy, it constitutes a plan revision. All revisions of approved implementation plans must be approved by the Administrator (40 CFR 51.8).

4. Section 51.6(c) of the regulations requires that "review of rules and regulations included in an applicable plan...be adopted after reasonable notice and public hearings...." However, the absence of a specific reference to compliance schedules in 51.6(c) raises an apparent inconsistency with §110 (a)(3) of the Act, which provides that "any revision" of a plan must be adopted after notice and public hearing. The possibility of confusion is increased by the fact that §51.6(d) includes a reference to compliance schedules. 5/

5. Recognizing that the requirement of a public hearing prior to the issuance of a variance may create a serious burden for some States, the only suggestion that can be made at this point is that the States be encouraged to submit compliance schedules that are realistic. This is consistent with the requirement of the §110 and the regulations that plans achieve the primary standards "as expeditiously as practicable" [emphasis added], but no later than three years from the date of approval.

§ § § § § § §

TITLE: Postponement of an Implementation Plan

DATE: April 18, 1973

MEMORANDUM OF LAW

FACTS

The Los Angeles Task Force is drafting a plan for the attainment and maintenance of the primary standard for photochemical oxidants in the Metropolitan Los Angeles Intrastate Air Quality Control Region. For the purpose of this Memorandum, it is assumed that the Administrator has granted a valid two-year extension of the 1975 deadline, and the plan will therefore provide for attainment of the standard in 1977.

4/ "Control strategy means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard...."

5/ Section 51.6(d) specifies that "any revision of rules and regulations and of compliance schedules be submitted...within 60 days following... adoption."

QUESTION

Can the implementation of all control measures in a promulgated implementation plan be delayed until the 1977 deadline when a two-year extension has been given?

ANSWER

No. Section 110(a)(2)(B) of the Act, and the Administrator's regulations, 40 CFR §51.30, require that "interim control measures" which are "reasonable" be provided for with respect to those sources which will be unable to comply with the control strategy by 1975. In addition, each plan must contain legally enforceable "compliance schedules" setting forth dates by which all stationary and mobile sources must be in compliance with any applicable requirement of the plan "as expeditiously as practicable," 40 CFR §51.15 (37 Fed. Reg. 26310, December 9, 1972).

DISCUSSION

1. The Clean Air Act requires that an implementation plan provide for the attainment of a primary standard "as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan . . . ." §110(a)(2)(A)(i). In addition, the Act requires that a plan include "emission limitations, schedules, and timetables for compliance with such limitations . . . ." §110(a)(2)(B).

It could be argued that only attainment of the standard, not steps toward attainment, must be achieved as expeditiously as practicable. It could be further argued that the schedules and timetables for compliance need not provide for compliance by each source as expeditiously as practicable, but could instead include other considerations.

However, this view would seem to run counter to the basic scheme of Title I to achieve clean air protective of public health at the earliest possible time. Therefore, Agency regulations provide that each plan must contain:

> legally enforceable compliance schedules setting forth the dates by which all stationary and mobile sources or categories of sources must be in compliance with any applicable requirement of the plan. Such compliance schedules shall contain increments of progress required by paragraph (c) of this section. 40 CFR §51.15(a)(1).

The compliance schedules designed to provide for attainment of a primary standard must provide for compliance with the applicable plan requirements "as expeditiously as practicable." 40 CFR §51.15(b). And most compliance schedules must provide for "legally enforceable increments of progress toward compliance by each affected source or category of sources." 40 CFR §51.15(c).

These regulations taken together mean that each requirement of the plan must be finally implemented at the earliest practicable date, and that it be implemented in increments as quickly as practicable. For example, a requirement for retrofit or inspection should involve progressive application to groups of mobile sources until all within the affected category are covered. (Thus, municipal vehicles might be covered first, then all fleet vehicles, then all recent pre-1975 vehicles, and finally all older vehicles.) A requirement for gasoline rationing should involve such rationing as can be done without causing undue hardship at the earliest date, with the percentage of rationing increasing as alternative transportation can be predicted to increase, with full application in 1977.

2. In situations where a two-year extension has been granted for attainment of the primary standard, the Act requires that the plan provide, with respect to the sources or classes of moving sources which are unable to comply with the requirements of the plan, for "such interim measures of control" as the Administrator determines to be "reasonable under the circumstances." §110 (e)(2)(B) and (1)(A). To implement this provision of the Act, the Administrator promulgated a regulation which requires that a request for extension must show that one or more emission sources or classes of moving sources will be unable to comply with applicable portions of the control strategy, 40 CFR §51.30(c)(2), and that such a showing must include:

> A showing that reasonable interim control measures
> are provided for in such plan with respect to emissions
> from the source(s) identified [as being unable to comply]
> . . . 40 CFR §51.30(d)(5).

There may seem to be an apparent conflict between the provisions of the Act as interpreted by this regulation regarding plans with extension requests, which allow interim control measures to be "reasonable" and the regulation for compliance schedules for all plans, which requires that compliance be achieved "as expeditiously as practicable." However, it is the view of this office that all plans providing for attainment of the standards in 1975 should follow the compliance schedule regulation and achieve increments of progress "as expeditiously as practicable", when an extension request is filed, the sources which are identified as unable to comply by 1975 should also be required to comply as expeditiously as practicable under the interim control measures, although in unusual circumstances where a feasible or practicable interim measure can be shown to be unreasonable, the Administrator may agree to a somewhat less stringent interim measure.

§ § § § § § §

TITLE: Extension of Compliance Dates for Individual Sources
Beyond Attainment Dates

DATE: August 31, 1973

FACTS

Your August 2, 1973, memorandum to Mr. Robert Zener raises several questions in connection with the dates for source compliance with regulations applicable to priority III regions. Specifically, you are concerned about the impact of the NRDC v. EPA decision in the First Circuit which established restrictions on the granting of variances beyond the mandatory attainment date established by the Clean Air Act. You are now faced with situations where sources in priority III regions desire variances from emissions-limiting regulations which would defer compliance beyond 1975.

QUESTION #1

May variances be approved by EPA which defer compliance beyond 1975 for sources located in priority III regions?

CONCLUSION #1

Since the control strategy in a priority III region is only designed for maintenance of the standards, the time restrictions set forth in §110(a) (2)(A) and 40 CFR §51.15(b) do not limit the time for requiring compliance by individual sources. The First Circuit Court of Appeals, in our opinion, was addressing the problems associated with control strategies designed both for attainment and maintenance. Therefore, that decision does not restrict the deferral of compliance dates in priority III regions.

QUESTION #2

Must emission limitations in priority III regions be enforced?

CONCLUSION #2

Yes.

Amendments by the Conference Committee. [1] It is clearly separate from and in addition to §110(e)'s provision for extending for two years the three-year attainment date for national primary standards, and there is nothing in its terms or its legislative history to indicate that it does not authorize a delay in compliance where the result would be a failure to meet the standard by mid-1975 (or mid-1977 where a two-year extension was already in effect). [2] The section specifically conditions the one-year postponement on the Administrator's determination that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health" ((f)(1)(C)). Since the primary standard would protect the public health if achieved, there was no need for Congress to be concerned with interim measures to protect public health unless the postponement would interfere with the achievement of the primary standard. The net effect of the section is to permit deferral for up to one year of the achievement of the standard provided the conditions in the paragraph are met and such steps as are feasible are taken to minimize the impact on public health.

---

[1] The provision had no counterpart in the House bill, but the Senate bill included a provision allowing U.S. District Courts to extend for one year (with renewals allowed) the deadline for attainment of a primary standard, upon petition by the Governor or a State.

[2] The Senate Conferees explained the effect of §110(f) in their "Discussion of Key Provisions", as follows:

> "A Governor may also apply for a postponement of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan. . . ." 116 CONG. REC. 20600 (daily ed. Dec. 18, 1970).

As interpreted and applied by the Agency under 40 CFR 51.32(f), 110(f) would not come into play unless the proposed postponement would interfere with the attainment of a national standard within the time specified in the plan.

We should emphasize that EPA may only grant a one-year postponement if the Governor of the State applies to the Administrator and after the Administrator holds a formal hearing under paragraph (f)(2)(A), makes a fair evaluation of the entire record of the hearing, and makes a statement setting forth the findings and conclusions required by paragraph (f)(1).

QUESTION #2

May EPA disapprove implementation plan compliance schedules which are designed to improve air quality in areas already achieving national primary standards.

ANSWER #2

There is no legal basis on which EPA could reject either compliance schedules or plans which achieve ambient air quality levels more stringent than that required by the Clean Air Act or which achieve the levels required by the Act sooner than necessary under the law.

DISCUSSION # 2

The operative language of §110 is that the Administrator shall approve any implementation plans which are consistent with the requirements of the Act.

As you are aware, we have argued in other contexts that there is no real discretion in the Administrator either to require more than is set forth in the Act or to permit the States to do less than that which the Act requires. Specifically, §110(a)(2)(A)(i) requires that each State's plan provide for attainment of the primary standards "as expeditiously as practicable" but no later than mid-1975 (except under a §110(e) extension). The legislative emphasis was clearly on speedy protection of public health, and the determination as to practicability is clearly the State's.

As you are aware, §116 of the Act reserves to States the rights to have more stringent standards than required by the Clean Air Act. This of course would include the right to achieve those or national standards sooner than mid-1975 and would include the right to achieve such standards in an unreasonably short length of time.

There is simply no provision of the Act which we could point to to provide legal support for rejection of schedules or plans which complied with the requirements of §110. A review of the legislative history fails to reveal any reference to the situation which you describe, namely, where the aggregate effect of the implementation plans is to create a shortage of fuel or abatement equipment which is likely to result in some areas not being able to meet the primary standards while other areas use these resources where they could meet the primary and perhaps even the secondary standards without them.

While there is certainly justification for telling all of the States that their aggregate efforts create a situation in which individual time schedules become "unreasonable", failure to approve the schedules in accordance with the Act does not appear to be warranted and from a practical point of view, would undoubtedly create a great deal of disruption. In this connection the Administrator's disapproval under the law is to be followed by promulgation of appropriate measures. It would be very difficult to argue that appropriate measures are those which are less stringent than those which the States submitted. Failure to take any action would not ease the situation since it would leave the State regulations in effect but since they were not approved by EPA would deprive EPA of any enforcement power over that portion of the State plan.

QUESTION #3

May EPA approve variances extending beyond 1975-76 to State implementation plan regulatory requirements in areas (1) which are meeting primary but not secondary standards, if the date in the plan for achieving secondary standards is reset beyond 1975-76? (2) which are already achieving secondary standards?

ANSWER #3

(1) Yes, but the resetting of the attainment date must also be approved by EPA in accordance with the requirements of 40 CFR 51.132(b).

(2) Yes.

DISCUSSION #3

The Act's requirement that secondary standards be achieved within a "reasonable time" has, in the case of sulfur dioxides, been interpreted and applied by EPA regulations to mean that where the application of "reasonably available control technology" will achieve the standards, they must be met by mid-1975, unless the State shows that good cause exists for not applying that technology (40 CFR 51.13(b)). The regulations (40 CFR 51.1(o)) provide a basic definition of "reasonably available control technology" as meaning the controls and techniques which will provide for the emission limitations in Appendix B to Part 51, but qualify that by stating that Appendix B's emission limitations should not be adopted without considering "the social and economic impact of such emission limitations, and.... alternative means of providing for attainment.... of such national standard". Presumably, either of these issues would provide a basis for the "good cause" showing mentioned above.

Except with respect to highly industrialized areas, most of the State plans specify attainment of the secondary standards for sulfur dioxide by mid-1975, because either the State or EPA prescribed that date. (Plans for attainment of the secondary standards in many problem areas have not yet been finalized, due to EPA granting of 18-month extensions under §110(b). Postponement of these attainment dates will constitute plan revisions which will have to be approved by EPA after public hearings. Such approval will have to be consistent with the requirements of EPA regulations discussed above. "Good cause" showings that specific fuels and/or hardware are not available in fact in a given area would, in our view, provide supportable grounds for a postponement. Obviously, there is a significant distinction between the availability in a developmental sense of a type of control system or technique and the actual availability in the marketplace of that control or the means to effectuate that technique.

If it is determined that the Agency's regulations do not provide the States adequate flexibility in setting reasonable dates for attainment of the secondary standards, EPA may amend its regulations to allow greater flexibility. The language and legislative history of §110 make clear that Congress did not place the same emphasis on achieving the secondary standards as it did on the attainment of the primary standards. In any case, it is clear that EPA may not compel the States to defer attainment of the secondary standards or even more stringent State standards, although it may encourage them to do so.

In areas where secondary standards are already achieving secondary standards, the emissions from existing sources have been included in the calculations establishing that the standards are being attained. If States grant variances to those sources which would allow them to continue to emit at existing levels beyond 1975-76, EPA may approve the variances because there would be no added emissions involved which could threaten maintenance of the standards. The construction of new sources of a pollutant already being emitted does, of course, raise the threat of failure to maintain the standards. Provisions for dealing with new sources in clean areas are, however, adequately included in implementation plans in accordance with the requirements of 40 CFR 51.18 that new source construction be prohibited if it will "interfere with the.... maintenance of a national standard." 3/

QUESTION #4

May EPA approve a request by a State for a two-year delay in achieving primary standards under §110(e)? This request would be on the basis of new evidence that alternatives to comply with the Act (e.g., clean fuels) are not available?

3/ Depending upon the final outcome of Sierra Club v. Ruckelshaus in the U.S. Supreme Court, EPA may be required to require State plans to include not only this protection of national standards, but also protection against significant degradation of air quality in areas already meeting secondary standards.

ANSWER #4

We have previously taken the view that the two-year extensions may be granted if they are requested prior to February 15, 1973. This view is currently being reexamined in light of the recent decision in NRDC v. Ruckelshaus, and we will advise you as to any changes.

§ § § § § § §

TITLE: Necessity of Public Hearings on Compliance Schedules

DATE: February 25, 1972

MEMORANDUM OF LAW

FACTS

In connection with EPA review of State implementation plans. there has been considerable discussion regarding source compliance schedules which are not included as part of a control regulation. States have differed in their approaches to adoption of these schedules and their submission to EPA for approval. Some States have adopted or will adopt such compliance schedules as part of variances to control regulations, while others utilize them to assure that sources take the steps necessary to meet control regulations having effective dates which are months or years distant. The necessity of public hearings in the former situation was discussed in our memorandum to you of February 4, 1972.

QUESTION #1

Are source compliance schedules required to be the subject of public hearings?

ANSWER #1

Each source compliance schedule which is included in a State's control strategy to achieve or maintain a national ambient air quality standard constitutes part of the State's implementation plan required to be submitted to EPA for approval, and is required by section 110 of the Clean Air Act to be the subject of a public hearing. The requirement for hearing applies whether the compliance schedule is set forth by regulation, administrative order, or other legally enforceable means other than court order.

QUESTION #2

Must States submit to EPA as part of their implementation plans, all compliance schedules for individual sources?

ANSWER #2

Each individual source compliance schedule which constitutes part of a State's control strategy must be submitted to EPA as part of its implementation plan.

QUESTION #3

Do EPA's regulations governing preparation, adoption, and submittal of implementation plans (40 CFR Part 51) clearly set forth the requirement for public hearings on compliance schedules?

ANSWER #3

While sections 51.15(a)(1) and 51.4, when read together, clearly provide that compliance schedules must be included in the plan initially submitted to EPA and that such plan must be the subject of a public hearing, the provisions of section 51.15(a)(2) allowing States to postpone the negotiation and submission of compliance schedules for individual sources beyond initial plan submission has apparently left room for doubt as to whether such schedules must be the subject of public hearings.

QUESTION #4

Must EPA apply the notice requirements of 40 CFR 51.4 to public hearings held on compliance schedules?

ANSWER #4

Although 40 CFR 51.4 now requires 30 days notice of a public hearing, this requirement is based upon EPA's determination of what constitutes reasonable notice of an entire plan, and EPA could prescribe by regulation a different period of notice designed to provide reasonable opportunity for adequate public scrutiny of more-limited subject matter.

DISCUSSION

NOTE: Each topic in this section is numbered in accordance with the related question above.

1. Section 110(a)(2)(B) of the Act specifically provides that State implementation plans shall include "...emission limitations schedules and timetables for compliance with such limitations..." [emphasis added]. This requirement is elaborated upon in section 51.15 of EPA's regulations on implementation plans, which provides that each plan must contain legally enforceable compliance schedules for all sources or source categories subject to requirements of a control strategy, but allows States as much as approximately one year from the date that plan submission is required (January 30, 1972) to negotiate and submit as part of the plan any individual source compliance schedules which it is impossible to negotiate and adopt prior to January 30, 1972. The allowance for later submission of individual compliance schedules [1]

---

[1] In most cases these schedules would bind sources to specified actions to insure that they meet the compliance dates set forth in control regulations.

reflected the Agency's judgment that (1) most States could not handle initial plan preparation and individual source compliance schedule negotiation contemporaneously and (2) the initial evaluation of plans, particularly control strategies, to determine compliance with section 110 of the Act could be done without such individual schedules included. Essentially, the submission of the individual schedules has been treated as an amendment to the initial submission of the plan. Such schedules are distinguishable from variances or exceptions, since they would not revise an approved plan.

Because compliance schedules included in a control strategy are required by the Act and EPA regulations to be included in a State's implementation plan, they are also required to be the subject of public hearings. Section 110 clearly provides that the Administrator is to approve a plan or each portion of a plan "if he determines that it was adopted after reasonable notice and [public] hearing...." 2/ In addition, there are numerous statements in the legislative history, both in committee reports and in floor discussions, which attest to the importance that the Congress attached to public involvement in the development of State air pollution control measures required by the Act. In the face of such unequivocal expression of congressional purpose, arguments that compliance schedules ought not to be subjected to public examination because of the administrative burden involved or because they traditionally have been kept from the public's view must fail. Just as the Act's requirement of compliance schedules is intended to insure that States will require sources to obtain necessary controls by the regulations' compliance dates, the public hearing requirement is designed to insure public oversight of the State agency's actions.

2. In order to be able to make the best possible evaluation of a plan to determine compliance with section 110 of the Act, the Agency decided that it is necessary and reasonable to require that all existing portions of a control strategy be submitted for initial plan review (see 40 CFR 51.15). Apparently, some States have submitted to EPA implementation plans which do not include individual source compliance schedules that are in effect and which directly affect a control strategy. While this approach is acceptable where the State recognizes that the schedule is inadequate to effectuate the control strategy and plans to renegotiate the schedule for later submission as part of its plan pursuant to EPA's regulations (section 51.14(a)(2)), the withholding of other existing schedules constitutes failure to comply with those regulations (section 51.15(a)(1)).

3. As noted above, section 51.15(a)(1) of EPA's regulation provides that each implementation plan shall contain compliance schedules for all sources covered by a control strategy, and section 51.4(a) requires that each plan be the subject of at least one public hearing. We see no basis, therefore, for the position taken by some States that the regulations do not clearly require compliance schedules of general applicability adopted by regulation and schedules administratively negotiated with individual sources (whether as part of a variance or by other means) to be covered in the initial public hearing on plan adoption. The argument that section 51.15(a)(2) appears to remove individual source compliance schedules negotiated between January 30, 1972 and January 1, 1973 from the plan *per se* may have somewhat more merit. Any

---

2/ This provision is implemented by section 51.4 of EPA's regulations.

confusion in this area could be cured by amending section 51.15(a)(2) to expressly re quire public hearings on these schedules prior to submission to EPA. The section should also make clear the submission requirements for any such schedules adopted after the first semi-annual reporting period.

4. We are aware that the holding of a public hearing on each individual source compliance schedule by approximately January 1, 1973, may present substantial problems for any State which regulates many sources under a control strategy. The prospect of procedural delays interfering with the substantive progress in State action directed by section 110 is unsettling. 3/ It is appropriate, therefore, to examine whether the "reasonable notice" requirement of section 110 of the Act may be met by notice other than the 30 days prescribed by section 51.4(b) of EPA's regulations. 4/ This provision of the regulations was designed to provide adequate apportunity for public analysis of a rather lengthy document dealing with numerous and diverse sources. In the case of an individual source compliance schedule, the verbiage and issues are much more limited and, logically, reasonable notice could involve a much shorter time period. We recommend, therefore, that OGE and OAP consider amending section 51.4 so as to define a different "reasonable notice" period for hearings on individually negotiated source compliance schedules 5/, e.g., 15 days.

It would also be advisable to explain in the regulations that a separate and distinct proceeding need not be called for each schedule. We are of the opinion that the hearing requirements of section 110 would be satisfied by providing an opportunity for hearing in a proceeding in which the calendar is arranged much like that of a traffic court, so that schedules on which no one wishes to be heard need not cause delay.

Finally, we wish to make clear that we do not think the Act in any way precludes private negotiations between State agencies and sources on compliance schedules, provided that the public is afforded sufficient notice of the substance of the schedule to be able to assess its merits prior to hearing. In order to provide for adequate review, section 51.4 should require that each

---

3/ The Administrator, in testimony before the Air and Water Pollution Subcommittee of the Senate Public Works Committee on February 18, 1972, pointed out the competing policies involved in this matter. He also noted that he believed that section 110 requires public hearings on all compliance schedules.

4/ An argument can be made that section 51.4(b) restricts the 30-day notice requirement to rules and regulations only, because of the "as a minimum" language. However, we think the "principal portions" requirements governs and, in this situation, the compliance schedule is the only portion of a plan involved.

5/ Also note that section 51.6(c) requires that revisions of rules and regulations be adopted after notice and hearing pursuant to section 51.4. Our memorandum to you of February 4, 1972, points out that section 51.6(c) must be amended to include reference to compliance schedules.

source for which a schedule has been negotiated be identified in the publication of notice, and that each compliance schedule be available for public inspection during the notice period in at least one location in the air quality control region in which the source is located.

§ § § § § § §

TITLE: One-Year Postponement Under §110(f)

DATE: June 12, 1973

MEMORANDUM OF LAW

BACKGROUND

1. Under §110(f) of the Clean Air Act of 1970, the Governor of a State may request that the effective date of a requirement of an implementation plan, as it applies to a specific source, be postponed for a period not to exceed one year. Section 110(f)(2) contemplates that any determination relating to such postponement request shall be (1) on the record after notice to interested persons and pursuant to a hearing; (2) based on a fair evaluation of such record; (3) embodied in a statement setting forth in detail findings of fact and those conclusions upon which the determination is based.

2. To qualify for a postponement, the petitioning party must meet the following statutory requirements:

(a) A good faith effort must have been made in attempting to meet the requirement in question. §110(f)(1)(A)

(b) The requirement is unattainable within the time frame specified by the implementation plan because the technology needed to satisfy the requirement is either unavailable or has not been available for a sufficient period of time. §110(f)(1)(B)

(c) Any available operating procedures will be used during the postponement period to abate the impact of the source in question. §110 (f)(1)(C)

(d) The continued operation of the source is essential to national security or to the public health or welfare. §110(f)(1)(D)

3. The question presented are as follows: 1/

(a) Is the procedure contemplated by §110(f) rule-making or adjudicatory in nature?

1/ See memorandum of Edward E. Reich dated May 31, 1973.

(b) If adjudicatory, is a formal §554 Administrative Procedure Act (APA) hearing required?

(c) If a formal APA hearing is required, who may participate and what procedural rights are available to such persons?

(d) What is contemplated by the phrase "the continued operation of the source is essential to national security or the public health or welfare?"

DISCUSSION

Question 1: Is the procedure contemplated by §110(f) rulemaking or adjudicatory in nature?

1. The answer to this question turns on whether the information sought to be elicited in §§110(f)(A) - (D) is adjudicatory rather than legislative. If the former, it is well settled that a determination should not be made without first giving the parties involved an opportunity "to know and to meet any evidence that may be unfavorable to them." Davis, Vol. 1 §7.02 at 413. Conversely, where the facts to be adduced are legislative in nature an evidentiary hearing is not required. Davis, Supp. Vol. §7.04 at 321.

2. As stated by Professor Davis, "Adjudicative facts are facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, when, how, why . . . ." Davis, Vol. 1 §7.02 at 413. Therefore, because the parties know more about such facts than anyone else it logically follows that they are in the best position to rebut or explain evidence that bears upon such (adjudicative) facts. 2/ Id. at 413.

3. By contrast, legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." Davis, Vol. §7.02 at 413.

4. In the context of §110(f) it is clear that requirements (a) and (C) are adjudicative in nature in that they look to facts which directly apply to the parties -- viz., has good faith been shown; will steps be taken to reduce the impact of the source during the period of postponement? However, the same analysis can not be as neatly applied to requirements (B) and (D).

In the case of requirement (B), it is probably fair to say that most inquiries will call for adjudicative facts. However, it is possible to think of situations where the facts being adduced will tend toward being legislative rather than adjudicative. For example, under requirement (B) the question of whether a source has access to necessary technology would, at first blush, appear to always call for adjudicative facts. This is because the source is in the best position to attest to the technological problems it has encountered in unsuccessfully attempting to comply with the applicable control strategy. However,

---

2/ The Supreme Court has noted that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970) if the source were, for example, a power plant, its contention that a certain type of scrubber was needed to bring it into compliance might well lead to the dual question of whether such methodology was, in fact, the only way of remedying the problem and, if not, what alternative technological approaches were available. Because these questions look to facts which, in most cases, will not be in the possession of the source, a persuasive argument can be made that such facts are legislative in nature.

Similarly, while the question of whether a community can survive for a year without its principle factory would undoubtedly be considered adjudicatory in nature, if that factory happened to be a munitions plan, the question of whether the continued operation of such a facility was essential to national security (see requirement (D)) would seem to call for legislative rather than adjudicative facts.

In spite of this inconclusive state of affairs, since an adjudicatory proceeding will, in any event, be necessary under §110(f)(1)(A) and (C), it would seem prudent and reasonable to treat the facts relating to requirement (B) and (D) as also coming within the purview of such proceeding. 3/

Question 2: If an adjudicative proceeding is required, is a formal APA hearing required?

1. Section 110(f)(2)(A) of the Clean Air Act stipulates, in part, that a determination relating to the one year postponement provision of §110(f)(1) shall be "made on the record after notice to interested persons and opportunity for hearing . . . ." Section 554 of the Administrative Procedures Act (APA) states as follows:

> This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing....

Since the language from §110(f)(1) cited above clearly specifies the procedural requirements set forth in APA §554 it follows that a hearing under §110(f)(1) must contain all of the procedural elements of an APA hearing. 4/

Question 3: What are the requirements of an APA hearing?

A. Who May Participate?

3/ The fact that evidence relating to requirement (D) may be legislative in nature does not prevent it from being treated as adjudicative. See Davis, Vol. 1 §7.06 at 431 where it is said: "Even where no legal right to a trial exists, a trial may still be appropriate. The question of whether to use the method of trial for legislative fact is one of convenience, not one of legal right."

4/ This view is also contained in a March 19, 1973, EPA memorandum drafted by Jeffrey H. Schwartz then of the General Counsel's office. Similarly, in a letter dated June 4, 1973, the agency has gone on the record as stating that a "formal hearing" is required. See letter of the Acting General Counsel, dated June 7, 1973, to Arch A. Moore, Jr., Governor of West Virginia.

1. Although §110(f)(1) authorizes no one other than the Governor of a State in which an affected source is located to petition the Administrator for a year's suspension, it is not stated that only he or his appointee may appear in or be a party to the proceeding in which such a request is raised. Indeed, since the essential characteristic of an adjudicatory hearing is that of drawing out facts which are not in the public realm, it would seem that any person who has an interest in the proceeding and who possesses facts which will contribute to a well-reasoned determination should be allowed to be a party to or intervene in a §110(f) proceeding. Such persons might, for example, include the proprietor of the source, the executive officer of the community affected by the source, responsible public interest organizations, and any other persons who have an interest in the proposed suspension and who possesses pertinent knowledge not known to the foregoing persons.

2. A useful analogy is provided by the definition of "party" as used in §125.34 of the National Pollutant Discharge Elimination System (NPDES) published in the Federal Register on May 22, 1973. NPDES §125.34(c)(1) states, inter-alia, that within 30 days following public notice of an adjudicatory hearing to consider the issuance of a discharge permit application, any person. 5/ may submit a request to be a party to such hearing. A request to be a party must:

(i) State the name and address of the person making such request (§125.34(c)(2)(i));

(ii) Identify the interest of the requestor, and any person represented by issuance or nonissuance of the permit (§125.34(c)(2)(ii));

(iii) Identify any other person whom the requestor represents (§125.34(c)(2)(iii));

(iv) Include an agreement by the requestor, and any person represented by the requestor, to be subject to examination and cross-examination, and in the case of a corporation, to make any employee available for examination and cross-examination at his own expense, upon the request of the presiding officer, on his own motion or on the motion of any party (§125.34(c)(2)(iv)); and

(v) State the position of the requestor on the issues to be considered at the hearing §125.34(c)(4)).

5/ The term "person" is defined as follows: (2) "Person" shall mean the State water pollution control agency of any State or States in which the discharge or proposed discharge shall originate or which may be affected by such discharge, the applicant for a permit, and any foreign country, Federal agency, or other person or persons having an interest which may be affected. §125.34(a)(1). Compare §302 of the Clean Air Act where the definition of "person" is not grounded on any specific "interest".

If the above requirements are met, the Administrator must grant the request to participate as a party. §125.34(g). 5a/

B. Procedural Requirements

1. The procedural elements which are necessary to a formal APA hearing are set forth in the Appendix which accompanies this memorandum.

Question 4: What is meant by the phrase contained in §110(f)(1)(D) that "the continued operation of such source is essential to national security or to the public health or welfare?"

A. Preliminary Considerations

As an initial proposition, it should be stated that subsection (d) is one of four provisions which must be satisfied before §110(f)(1) assistance can be granted to a petitioning State. The other three provisions are found in subsections (A) through (C). Technically, all four subsections must be satisfied for the Administrator to take remedial action. However, as a practical matter, it may be that subsection (D) will have little bearing on whether the determination of the Administrator under §110(f)(1) is ultimately upheld or rejected by a reviewing court.

This is because once a State has come forward and shown (1) good faith on the part of the source (§110(f)(1)(A)), (2) the absence of adequate technology (§110(f)(1)(B)), and (3) its sincere intent to use all available measures to protect the health of persons in the area affected by the source during the requested suspension period (§110(f)(1)(C)), it is submitted that a fair-minded judge would be hard pressed to uphold the Administrator's denial of §110(f)(1) relief solely because the State was unable to show that such relief was essential to either national security or the public health or welfare (§110(f)(1)(D)). Nevertheless, subsection (D) is part of the statute and must, therefore, enter into any determination under §110(f)(1).

DISCUSSION

There are three terms in subsection (D) which must be defined if §110(f) is to be administered with any degree of uniformity: (a) national security; (b) public health; and (c) welfare. 6/ In construing these terms it is important to keep in mind that they are used in the disjunctive. Accordingly, even though the continued operation of a source may have little to do with national security, its continuation may, nevertheless, be justified by reference to either the public health or the public welfare of persons in the area affected by the source.

5a/ Following the expiration of the 30 day period referred to above, any "person" (see note 5 on previous page) may file a motion for leave to intervene NPDES §125.34(g).

6/ The term "essential" will be considered in conjunction with the terms enumerated above. Suffice it to say that the dictionary defines "essential" as meaning "absolutely necessary" or "indispensable." See The American College Dictionary at 410.

1. The meaning of "national security".

a. The reference to "national security" as used in §110(f)(1)(D) of the Clean Air Act does not appear in either the House or the Senate version of the statute. The Senate bill did, however, embody a provision which permitted a one year extension where, among other things, the failure to achieve ambient air quality standards was due to an exemption granted to a federal facility under §118 of the bill proposed by the Senate. Notably, §118 of the Senate bill authorized the Secretary to grant exemptions to Federal facilities (i.e., Federal property, vehicles or vessels) only if such exemption was in the "paramount interest of the United States." It is entirely possible that the phrase quoted in the preceding sentence was the progenitor to what is now the reference to "national security" in §110(f)(1)(D). If this were so, it could be argued that the "paramount interest" language was withdrawn in favor of a more limited concept, i.e., "national security". Unfortunately, the Senate Committee report fails to elucidate on what was intended by the phrase "paramount interest" of the United States. It is, therefore, difficult to draw any conclusions from the abandonment of such language in the final enactment of the statute.

b. The bill proposed by the Conference Committee did include a reference to "national security" in terms identical to the language now found in §110(f)(1)(D) of the Act. 7/ However, the Conference Committee report sheds little light on why this language was adopted or what it was intended to mean.

c. Given the dearth of legislative history on the matter, it is logical to look to other sections of the Act which incorporate a "national security" concept. Hence, although the President has authority to exempt a Federal emission source from applicable State or national standards if he determines that such exemption is in the "paramount interest of the United States," (see §118 of the Clean Air Act), he may not exempt such source from the requirements of §112 other than for reasons of "national security" (see §112(c)(2) of the Clean Air Act). The strong inference to be drawn from the above statutory structure is that Congress regarded the concept of "national security" as being markedly more limited than the phrase "paramount interest of the United States" -- a phrase which, arguably, also connotes "security-type" overtones. (This, of course, comports with the suggestion raised in paragraph a above.)

d. The conclusion which I draw from the above is that when the Conference Committee chose the term "national security" as one of the §110 (f)(1)(D) prerequisites it intended to restrict that term to matters of the nation's safety, i.e., matters of a military or national defense nature. This conclusion is consistent with the position taken by this office in defining the term "national security" for purposes of §203(b)(1). See memorandum of Michael A. James, January 24, 1973, in which the following statement appears at page 3:

7/ See report of the Conference Committee to accompany H.R. 17255 at 8.

> "It appears . . . that the intention of the Congress with respect to exemption involving 'national security' was focused on 'defense-related' and combat vehicles, and there is no evidence available of some other purpose. . . . ." 8/

2. Meaning of "public health".

a. The precursor to §110(f) of the Clean Air Act is found in §111(f)(4)(A) of the Senate Bill which, in pertinent part, states as follows:

> (4) The Court . . . shall grant relief only if it determines such relief is essential to the public interest and the general welfare of persons in [the affected] region, after finding
>
> (A) that substantial efforts have been made to protect the health of persons in such region . . .

The Senate Committee report, apart from emphasizing that §111(f)(4) was designed to serve as a last alternative, does little to illuminate the above provision. The following excerpt contains pertinent language from the committee report:

> The Committee expects that an extension of time would be granted only as a last alternative. Therefore, the bill would provide that the Court could grant relief in the paramount interest of the United States and in the public interest and general welfare of the persons in such region only after finding that substantial efforts had been made to protect the health of persons in such regions . . . 9/

b. The language cited above in both the Senate bill and committee report bears a close resemblance to what is now §110(f)(1)(C) of the Act and which reads as follows:

> (f)(1) If [among other things] the Administrator determines that
>
> (c) any available alternative operating procedures . . . will reduce the impact of such source on public health . . .
>
> * * * *
>
> then the Administrator shall grant a postponement of such requirement.

8/ Although the term "national security" is used in other statutes, the propriety of defining it for purposes of the immediate statute, by reference to such other statutes, is somewhat questionable. See Cole v. Youngg, 351 U.S. 536 (1956) and discussion of same contained in memorandum cited above.

9/ Report on S. 4358, 91st Cong., 2d Sess. at 15.

c. Both the provision in the Senate Bill and the language which now appears in §110(f)(1)(C) of the Act speak in terms of protecting the health of persons in the impacted region during a postponement period. This concept should be compared with the use of the phrase "essential to the public health" as it appears in §110(f)(1)(D). In the latter setting, the term "public health" serves as a basis for determining the necessity of a requested postponement.

d. From the above, it follows that the term "public health" as used in §110(f)(1)(D) of the Act was intended to serve as more than just a directive to be solicitous of the public health of persons affected by an extension under §110(f). Rather, it was used in the sense of a very strict prerequisite -- i.e., that a continuation would be granted only as a last alternative and only if such continuation was essential in terms of protecting and preserving the health and physical well-being of persons in the affected area.

e. An example of an offending source which might qualify under the "essential to the public health" language of §110 (f)(1)(D) might be that of a hospital which is unable to comply with applicable air quality standards within the time frame specified by the governing state implementation plan. Were such a facility to be closed down pending its being brought into compliance, it is likely that the suspension of its activities would create a severe health hazard in the community it served. Under such circumstances, it could reasonably be argued that the continued operation of the hospital was essential to the public health of the surrounding community.

f. Another example of a source whose continued operation might be "essential to public health" is that of a power plant. If the power plant constituted a major source of heat and power in the community which it served then any disruption of its activities would, undoubtedly, have far-reaching consequences: hospitals would have to strain their auxiliary power equipment; street lights and traffice signals might be rendered inoperative; and the community's supply of heat might have to be rationed even during cold weather months. Given the above, I believe that a very compelling argument can be made that the continued operation of the power plant was "essential to public health".

g. A third example of a source which might qualify under the "essential to public health" language of §110(f)(1)(D) would be that of a municipal incinerator. Obviously, if such a facility were closed down and large amounts of refuse were allowed to accumulate, the public health of the community could easily become imperiled. However, the continued operation of such a facility (pursuant to §110(f)) would only be justified under circumstances where no reasonable alternative could be developed for disposing of the community's waste.

3. Meaning of "public welfare".

a. The origin of the term "public welfare" is found in §111(f)(4) of the Senate Bill which, in pertinent part, states that "The Court . . . shall grant relief only if it determines that such relief is essential to the public interest and the general welfare." The caution in the Senate Committee report that §111(f)(4) was to be utilized only as a "last alternative" is underscored by the use of the word "essential" in the passage quoted above. Accordingly, it is clear that the test contemplated by the Senate was to be a very strict one.

b. The use of the conjunctive "and" in both the Senate bill and committee report suggests that the test could be satisfied only by looking at both the public interest as well as the general welfare of persons in the affected area. Little additional light is shed by a reading of the Senate Committee reports.

c. Some guidance as to what is meant by "essential to the public welfare" may be obtained by reference to §202(b)(5)(i) which is the only other provision of the Clean Air Act in which the word "essential" modifies the term "public welfare". Section 202(b)(5)(D)(i) reads, in pertinent part, as follows:

> The Administrator shall grant a suspension of [a mobile source emission standard] only if he determines that such suspension is essential to the public interest or the public health and welfare.

d. In construing §202(b)(5)(D)(i), the Court of Appeals for the District of Columbia Circuit has interpreted the term "public interest" to include the impact of a decision to suspend on "jobs and the economy." 10/ In turn, these considerations -- and, to much lesser degree, consumer convenience and satisfaction -- played an important role in the April 26, 1973, decision of the Administrator to suspend the 1975 mobile source emission standards for one year. See 38 Fed. Reg. 10319, April 26, 1973.

e. Admittedly, the above interpretations were addressed to the term "public interest" as opposed to "public welfare". However, in light of the dual considerations of public interest and general welfare which are built into the legislative history of §110(f)(1)(D), it is submitted that what is meant by "essential to the public interest" should have a strong bearing on what was intended by the phrase "essential to the public welfare." In addition, in the context of unemployment, the Agency has recently stated, on the record, that §110(f) was "intended by Congress to prevent . . . serious unemployment." 11/

f. Based upon the above, I conclude that the reference to "public welfare" in §110(f)(1)(D) was primarily intended to cover those situations where (1) the continued operation of a source is essential to avoid severe unemployment or grave economic disruption within the region in which the source is located, and (2) no other alternative exists for preserving the economic well-being of persons in the affected area.

10/ International Harvester Co. v. Ruckelshaus, F2 (C.C.D.C. 1973)

11/ Letter of Acting General Counsel dated June 7, 1973, to Arch A. Moore, Jr., Governor of West Virginia.

g. Although, the term "welfare" is defined in much broader terms in §302(h), I do not believe that §302(h) was designed to apply to §110(f)(1)(D). This is because §302(h), by its terms, only applies to those provisions of the Act which are keyed to remedial action designed to reverse the injurious "effect" of pollution on the public welfare (see, e.g., §§103(f)(1); 108(a)(2)(A); and 109(b)(2)). By contrast, in §110(f)(1)(D), the tables are reversed and the public welfare is looked to as justification for continuing a source of pollution.

h. In defining the parameters of the term "public welfare", some consideration should be given to a recent state implementation plan case 12/ in which a one year variance provision designed to satisfy "the public good or allay undue hardship" 13/ was held to be less restrictive than the provisions of §110(f) of the Act, and, therefore, inadequate.

12/ See Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, ______ F2 ______ (1st Cir., 1973), involving implementation plans submitted by Rhode Island and Massachusetts.

13/ Regulation 50.1, Massachusetts proposed implementation plan.

APPENDIX

Procedural Requirements of a Formal APA Hearing
[Regulations to follow at a later date.]

1. Notice

"Persons entitled to notice of an agency hearing shall be timely informed of -- the time, place and nature of the hearings; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted." 5 U.S.C. §554(b).

In fixing the time and place for hearings, due regard shall be had for the convenience . . . of the parties or their representatives." 5 U.S.C. §554(b).

2. Pleadings and negotiations.

"The agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit . . ." 5 U.S.C. §554(c)(1).

3. The presiding officer.

(a) The presiding officer at the hearing may either be an independent hearing examiner (i.e., administrative law judge) or an employee of the agency. 5 U.S.C. §556(b).

(b) If, however, an employee of the agency is appointed, that person may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency," nor (except to the extent required by law for the disposition of ex parte matters) may he "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." 5 U.S.C. §554(d)

(c) "An employee or agent engaged in the performance of investigative or prosecutive functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . ., except as witness or counsel in public proceedings." 5 U.S.C. §554(d).*

---

* The NPDES regulations imposed the following restrictions on persons serving as presiding officers:

§125.34(a)(4)(ii) Qualifications - A judicial officer may be a permanent or temporary employee of the Agency who performs other duties for the Agency. Such judicial officer shall not be employed by the office of enforcement and general counsel or the office of air and water programs or have any connection with the preparation or presentation of evidence for a hearing.

(d) "The functions of presiding employees and of employees participating in decisions . . . shall be conducted in an impartial manner. . ." A presiding or participating employee may at any time disqualify himself." 5 U.S.C. §556(b).

(e) The agency must determine whether the presiding employee should be disqualified for personal bias, if a good faith affidavit to that effect is timely filed. The agency shall determine the matter as a part of the record and decision in the case. 5 U.S.C. §556(b)

(f) "Subject to published rules of the agency and within its powers, employees presiding at hearings may --

(1) administer oaths . . .;

(2) issue subpoenas authorized by law;**

(3) rule on offers of proof and receive relevant evidence . . .;

(4) take depositions . . .;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters.

(8) make or recommend decisions . . .

(9) take other action authorized by agency rule consistent with this subchapter." 5 U.S.C. §556(c).

(g) Unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision, the employee who presides at the reception of evidence shall make an initial decision unless he becomes unavailable to the agency. 5 U.S.C. §554(d); §557(b).

(h) "When the presiding employee makes an initial decision, that decision becomes the decision of the agency unless there is an appeal to, or review on motion of the agency within time provided by rule."

On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issue on notice or by rule. 5 U.S.C. §557(b).

4. Declaratory Orders.

The agency may issue a declaratory order to terminate a controversy or remove uncertainty. 5 U.S.C. §554(e).

** See §307(a)(1) which, for purposes of §110(f) empowers the Administrator to issue subpoenas for "the attendance and testimony of witnesses and the production of relevant papers, books and documents."

5. Right to Counsel

"A party is entitled to appear in person or by or with counsel or, if permitted by the agency, by other qualified representative." 5 U.S.C. §555(b).

6. Subpoenas

(a) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.

(b) On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law.

(c) In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply. 5 U.S.C. §555(d).

(d) A person compelled to appear in person before an agency is entitled to be accompanied, represented and advised by counsel. 5 U.S.C. §55(b).

7. Notice of Agency Action and Accompanying Explanation.

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. 5 U.S.C. §555(e).

8. Burden of Proof.

Except as provided by statute, the proponent of an order has the burden of proof. 5 U.S.C. §556(d).

9. Evidence

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. §556(d).

10. Sanctions

A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. 5 U.S.C. §556(d).

11. Rebuttal Evidence and Cross Examination.

"A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d)

12. Initial Decision by Agency Rather Than Presiding Employee.

> "When the agency makes the decision without having presided at the reception of the evidence [see 3(g) above] the presiding employee . . . shall first recommend a decision . . ." 5 U.S.C. §557(b).

13. Opportunity to Submit Proposed Findings and Conclusions Prior to Initial Decision.

> (a) "Before a recommended [or] initial . . . decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for consideration of the employee participating in the decisions --
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees . . .; and
>
> (3) supporting reasons for the exceptions or proposed findings and conclusions." 5 U.S.C. §557(c).
>
> (b) "The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial (and) recommended . . . decisions are a part of the record and shall include a statement of --
>
> (1) findings and conclusions and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record; and
>
> (2) the appropriate . . . order, sanction, relief or denial thereof." 5 U.S.C. §557(c).

14. The Record

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties." 5 U.S.C. §556(e).

In connection with the highly structured, procedural requirements set forth above, the following paragraph extracted from Page 13 of a memorandum of Mr. Jeffrey H. Schwartz, dated March 19, 1973, is noteworthy:

> "Despite the fact that these procedures may seem somewhat cumbersome, there is authority for expediting the proceeding.
>
> The requirement of an evidentiary hearing is not a mandate of a prolix procedure protracted beyond the requirements of the issues. Even in the most formal proceedings a capable hearing officer can evolve techniques that both expedite the proceeding and illuminate the issues. Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 590 (D.C. Cir. 1969) and cases cited.

TITLE: Number of Postponements Which may be Granted Pursuant to Section 110(f) of the Clean Air Act

DATE: March 10, 1971

MEMORANDUM OF LAW

QUESTION

This is in response to your recent oral request for our opinion as to whether the Administrator is authorized to grant multiple postponements of the applicability of any requirements of an approved implementation plan to a particular source (or class of sources) under section 110(f) of the Clean Air Act.

ANSWER

The Clean Air Act authorizes only a single postponement, of not over one year, of the date on which any implementation plan requirement becomes applicable to any source (or class of sources).

DISCUSSION

1. Section 110(f)(1) of the Clean Air Act provides:

> Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator [makes specified determinations], then the Administrator shall grant a postponement of such requirement. [emphasis added]

2. The italicized language in subsection (f)(1) suggests that only a single postponement of the applicability of any implementation plan requirement is authorized and that such postponement may not exceed one year in duration. Furthermore, section 110 contains no provision expressly permitting the extension or renewal of a postponement beyond one year. Had Congress intended to permit additional postponements, it could have included a provision similar to that contained in section 112(c)(2), which expressly authorizes the President to extend national security exemptions under that section "for one or more additional periods".

3. The legislative history of section 110(f) supports the view that no more than one twelve-month postponement of any plan requirement is authorized for any source (or class of sources). The Senate passed bill (S. 4358) amended the implementation plan section to authorize renewable extensions of the deadlines for achieving national ambient air quality standards. (Sec. 111 (f)(5): "The court... may grant renewals for additional one-year periods..."). However, this provision was deleted in the Conference Agreement, thereby evidencing Congress' intent not to allow multiple extensions of the deadlines.

4. The provision on extension of deadlines which ultimately prevailed apparently represents an accommodation between the Senate-passed version and the concerns raised in Secretary Richardson's letter to the conferees (Congessional Record, December 18, 1970, S. 20605-6). (The House passed version contained no deadlines and, therefore, made no provision for extension.) In return for permitting an extension at the time of submission of the implementation plan, as requested by Secretary Richardson, the number of postponements which could be granted prior to the effective date of plan requirements was limited to one.

5. Moreover, the "Discussion of Key Provisions" of the Conference Agreement submitted for inclusion in the Congressional Record (December 18, 1970, S. 20600-1) states, in part,

> A Governor may apply for a postponement of the deadline, if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan... Such a postponement is subject to judicial review. [emphasis added]

6. Use of the singular form in both instances indicates an intention to permit the Administrator to postpone the effective date of any requirement only once for each source (or class of sources). Compare Senate Report, No. 91-1196 (on S. 4358, September 17, 1970, p. 15) which states, "The bill would restrict relief to one-year extensions of the deadline" [emphasis added], where the plural form was deliberately used to denote the availability of multiple extensions. The "Discussion of Key Provisions" of the Conference Agreement, however, makes no reference to any authority to extend or renew a postponement or for such a postponement to exceed a one-year period.

7. A limitation on the duration and number of postponements available under section 110(f) is consistent with Congress' broader intent to establish firm "national deadlines" for the attainment of national primary ambient air quality standards. (Congressional Record, December 18, 1970, S. 20598). Section 110(a)(2)(A)(i) of the Act specifies that such standard is to be attained "as expeditiously as practicable". [emphasis added]. See also Senator Muskie's declaration that

> Within four and one-half years, the level of air quality in American cites, as to these major pollutants, should be adequate to avoid adverse effects on public health. (S. 20600)

8. While only one postponement of the applicability of any particular requirement of an implementation plan may be granted for a source (or class of sources), the Administrator, in our opinion, is not precluded by section 110 (f) from postponing the applicability of other requirements of a plan as to the same source (or class of sources) for up to one-year. However, it appears that under section 110(f)(1) any application filed by the Governor of the State to which the plan applies would have to treat separately each request for a postponement of each requirement of an implementation plan for each source (or class of sources). Likewise, that section appears to require the Administrator to make a separate determination on (although it does not require a seprate hearing on) each postponement of a particular plan requirement for a specific source (or class of sources).

TRANSPORTATION CONTROL PLANS

TITLE: Transportation Control Plans

DATE: August 11, 1972

MEMORANDUM OF LAW

QUESTION #1

What "transporation controls" are the States legally entitled to adopt?

ANSWER #1

The States may enact any transportation controls they choose, unless they are preempted by Federal law or barred by the Constitution.

QUESTION #2

What limitations are there on the power of a State to prescribe design, equipment, or emission standards for vehicles?

ANSWER #2

States may not directly regulate with respect to emissions of "new" motor vehicles, or impose requirements which would have the effect of regulating the manufacture of motor vehicles.

QUESTION #3

What may the Administrator require to be in State plans as a condition of approval?

ANSWER #3

The Administrator may disapprove a plan which will not attain or maintain the ambient air quality standards. In addition, he may prescribe guidelines indicating what measures must be taken to satisfy him that a given control will have the effectiveness claimed for it by the State's plan.

QUESTION #4

Are the States obligated to include in their implementation plans regulations for the "inspection and testing of motor vehicles to assure compliance with maintenance, warranty, and lead-free fuel requirements"?

ANSWER #4

See Answer #3. Compliance with such "requirements" by individual vehicle owners is not required by the Act.

QUESTION #5

What is the extent of the Administrator's authority to promulgate provisions when a plan is inadequate?

ANSWER #5

The broad language of §110 would appear to result in no statutory restrictions on the Administrator's authority to promulgate, as long as the measures are necessary to attain or maintain in national ambient air quality standards. Possible constitutional limitations regarding certain measures will be addressed at a later date.

DISCUSSION

1. If a State chooses to submit an implementation plan, there are certain required features in common for every plan (*e.g.*, provision for monitoring systems [1] and authority to take quick action in an emergency [2]). Apart from these specifics, the Act broadly requires that the plan be adequate to insure attainment and maintenance of national ambient air quality standards. Each State is free to select the kind of control strategy it wishes, which need not include transportation controls if other provisions are sufficient to attain and maintain the ambient air quality standards. [3]

2. When the Administrator determines that the State's control strategy will not attain or maintain the air quality standards, he must publish his proposed provisions for the implementation plan. If the State submits another plan in the meantime which can achieve the goals, the Administrator must approve it and withdraw his proposal. Otherwise he promulgates the plan (or portions thereof) which he has proposed. [4]

3. The scope of the term "transportation controls" is not delineated in the Act, but some guidance is provided in the legislative history. Senator Muskie, in reporting to the Senate on the conference committee bill, stated in the "Discussion of Key Provisions":

> Construction of urban highway and freeways may be required to take second place to rapid and mass transit and other public transportation systems. Central city use of motor vehicles may have to be re-

---

[1] §110(a)(2)(C).

[2] §110(a)(2)(F)(v).

[3] The Administrator must approve the plan if he determines that:

> "it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of . . . primary or secondary [air quality standards], including, but not limited to, land-use and transportation controls." §110(a)(2)(B).

[4] §110(c).

stricted. In some congested areas the number of operations of aircraft into an airport may need to be limited, or steps taken to reduce emissions while aircraft are on the ground. 5/

4. (Answer #1) a. States have broad legislative powers to protect the health and welfare of their citizens. These powers exist independently of the Clean Air Act, and are expressly reaffirmed by §116 of the Act:

> "Except as otherwise provided in Sections 209, 211(c)(4) and 233 (preempting certain state regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ." 6/

The Act imposes two restrictions on the States's power: first, they may not adopt or enforce a standard or limitation which is less stringent than one in effect under an applicable implementation plan or less stringent than one under section 111 (new stationary sources) or section 112 (hazardous air pollutants); second, they may not act where they are specifically preempted. 7/

b. It should be noted that §209, which prempts States from imposing certain limitations on "new" motor vehicles, also provides:

> "Nothing in [Part A of Title II] shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 8/

5/ Cong. Rec. S20600 (daily ed. Dec. 18, 1970).

6/ The three preemptions referred to are quite different in scope. Section 233 flatly prohibits all State standards respecting emissions of air pollutants from aircraft unless the standard is identical to the Federal standards. Section 209 prohibits State standards relating to the control of emissions from motor vehicles while they are "new," but allows State regulation thereafter. See Discussion at notes 10-14, infra. Section 211(c)(4)(C) prohibits States (except California) from prescribing or attempting to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive if the Administrator has found that no Federal control or prohibition is necessary, and has published his finding, or if the Administrator has prescribed a control or prohibition and the State's is different. However, a State may regulate motor vehicle fuels or additives if the Administrator finds that the State control or prohibition is necessary to achieve ambient air quality standards and it is part of an applicable implementation plan.

7/ §116.

8/ §209(c).

5. *(Answer #2)* Some type of State enforcement of vehicle emission standards is clearly contemplated by §207 which conditions the mandatory performance warranty on the vehicle owners having to bear a "penalty or other sanction . . . under State or Federal law." 9/ As noted above, however, section 209(a) prohibits State standards relating to control of emissions from new motor vehicles or engines. 10/ As we have previously advised at a reasonable time following initial retail sale (e.g., one year after such sale or upon second sale, second titling, or second registration), a State is free from any preemption. 11/

6. *(Answer #3)* There is no warrant in the Act for the Administrator to insist that a State adopt a particular kind of transportation control or other measure, if the State can show that the measures which it selects will attain and maintain the required ambient air quality standards. The Administrator may decide that he cannot accept the State's assertion that a particular measure will cause a certain reduction in air pollution. He might, for example, conclude that for vehicle emission standards (Federal or State) to have any quantifiable effect on air quality, it is necessary for the State to make violation of these standards by in-use vehicles illegal, to set up an adequate inspection program to enforce the standards, or to require certain periodic maintenance. Nothing in the Act prohibits EPA from laying down any such guidelines specifying what it will accept as being adequate to "insure" that air quality standards are met and protected. The question whether such guidelines must be published in the Federal Register pursuant to 5 USCA §552(a)(1)(D) cannot be resolved until the guidelines are formulated.

9/ §207(b)(2)(C).

10/ A "new motor vehicle" is defined in §213(3) as one the equitable or legal title to which has never been transferred to an ultimate purchaser. (Slightly different rules to imported cars).

11/ §116 and §209(a) make clear that there is no federal preemption of State emission standards generally, and of State regulation of motor vehicles in particular, except where expressly specified. *See* Discussion at notes 8-9, *supra*. The 1970 Senate bill would have given to the Federal government the exclusive authority to certify devices for used cars, leaving the States free to decide whether to require the devices. S. 4358, §211(c), as printed in *S. Rep. No.* 91-1196, 91st Cong., 2d Sess. 114-115 (1970). It contemplated, according to the General Statement in the committee report, that when "such devices had been certified, States with difficult problems could examine the value of requiring used vehicles operating within that State or region to install such devices or systems." Id. at 32-33. But the Senate-House conferees deleted from the bill all provisions for certification of retrofit devices by the Federal government; in addition, they left unchanged from the 1967 Act the provisions preempting State emission control for new vehicles only. According to an analysis of the conference committee bill inserted in the Congressional Record by Senator Muskie the reason for continuing preemption in the case of new motor vehicles was the "need for uniformity and the inability of manufacturers to produce different types of vehicles for a number of States." *Cong. Rec.* S20606 (daily ed. Dec. 18, 1970).

7. (Answer #4) a. As noted in paragraph 6 of this Discussion, the only required provisions in implementation plans are those needed to insure that a given part of a control strategy will meet ambient air quality standards. This applies to inspection and testing 12/ to meet emission standards, to transportation controls, and to all other measures.

b. Regarding possible State requirements designed to enforce compliance with maintenance or warranty requirements or lead-free fuel requirements, it must be understood that there are no such requirements imposed by the Act upon the individual vehicle owner. §207 makes maintenance a prerequisite to recovery by the owner against the manufacturer under the mandatory performance warranty, §207(b), and a pre-condition to the Administrator's issuance of a notice of non-conformity to the manufacturer for recall, §207(c), but no affirmative duty to maintain is imposed by the Act on the individual owner or operator of a vehicle. There is no Federal lead-free fuel requirement which applies to the individual owner or operator. The Administrator's power under §211(c)(1) is to regulate "the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle . . . ." This is to be implemented by proposed regulations contained in 37 Fed. Reg. 3882 (February 23, 1972), none of which extend to the vehicle owner.

8. (Answer #5) There would seem to be no statutory restrictions on the kinds of measures which the Administrator may promulgate, since the terms "transportation controls" and "other measures" in §110(a)(2)(B) are so broad, as long as such controls or measures are found to be "necessary" within the meaning of that provision. There may be constitutional limitations on the Administrator's power to promulgate certain types of controls (e.g., parking taxes). We are in the process of examining these matters.

12/ "Inspection/maintenance" is not a term used in this Memo, for it is not used in the Act, and the "maintenance" aspect of it implies a great deal which may not be supportable in the Act. For one thing, it is possible to have provisions for inspection and enforcement, without having regulations expressly requiring the maintenance to be done; maintenance thus would be obtained only to the extent that motorists felt it necessary to pass inspections. On the other hand, a State might make maintenance an affirmative requirement in itself, with prosecution for failing to meet periodic maintenance requirements whether or not needed in the case of the individual automobile. Therefore, this Memo uses words of the Act: "inspection" or "inspection and testing."

§ § § § § § §

TITLE: Legal Authority to Promulgate and Enforce Transportation Controls

DATE: February 28, 1973

MEMORANDUM OF LAW

FACTS

On January 15, 1973, the Administrator proposed a plan to achieve the primary national ambient air quality standard for photochemical oxidants in the Metropolitan Los Angeles Intrastate Air Quality Control Region (South Coast Air Basin) by 1977. 38 Fed. Reg. 2194 (January 22, 1973). Some of the measures proposed were necessarily extreme ones. Questions have been and will be raised concerning the Administrator's legal authority to carry out these or alternative measures, or to require the State to do so. These problems were recognized in the preamble to the plan:

> Questions also exist as to EPA's authority and capability for actual implementation of this proposal and of alternatives. These questions include the extent to which State or local governments should be required to perform functions contemplated by the proposal and the difficulties involved in Federal or State enforcement of the plan. 38 Fed. Reg. 2194, 2198.

This Memorandum outlines the legal framework within which promulgation and enforcement may be carried out. As the discussion below indicates, we feel that the Administrator may take a wide variety of actions. However, this is a new Act with no body of case law providing firm guidance on its scope. Legal challenge to the plans promulgated is inevitable, and chances of losing some of the challenges are not to be discounted. It is difficult to predict in any particular case whether a court will find grounds for overturning EPA promulgations of specific measures which we may have felt to be authorized. However, we feel that the risks may be minimized by the choice of some transportation controls rather than others, and by the choice of some rationales rather than others.

QUESTION #1

In promulgating an implementation plan or portion thereof, does the Administrator have the authority to require automobile owners and operators to install "retrofit" pollution control equipment on their automobiles (catalytic converters, evaporative controls, gaseous fuel conversion, etc.) to require that vehicles be tested and/or inspected periodically and maintained, and to require reductions in vehicle miles traveled through various means (registration limits, gasoline rationing, parking restrictions, road-use restrictions, or fees)?

ANSWER #1

For the most part, yes. Reading section 110(c) together with section 110(a)(2)(B), the implementation plan promulgated by the Administrator is to contain emission limitations, schedules, and timetables for compliance with such limitations, and such other measures (including land use and transportation controls) as may be necessary to insure attainment and maintenance of the national standards. While the issue is not free from doubt as to fees, the scope of this authority appears broad enough to encompass most of the control techniques listed in Question #1. In addition to the broad reach of section 110(a)(2)(B), there is possible additional authority for inspections and testing in section 110(a)(2)(G), and for fuel rationing in section 211. The Administrator's authority is, however, limited by a requirement of reasonableness.

QUESTION #2

Does the Administrator have the authority to impose on a State a requirement to institute the controls listed in Question #1?

ANSWER #2

In many instances, yes. We believe that a legally supportable position would be that a highway, road, or public parking lot is a "public facility" owned or operated by the State or locality and that the State or locality can be made responsible for reducing private automobile emissions generated on and by the use of that facility.

QUESTION #3

Does the Administrator have the authority to require a State to provide expanded mass transit facilities, or to include provisions for Federal or State cooperation in a plan?

ANSWER #3

We do not believe that adequate authority exists under the Clean Air Act to require a State to provide expanded mass transit facilities. On the other hand, the Administrator's plan may point out the need for mass transit improvements to implement.

DISCUSSION - GENERAL

1. The Administrator must promulgate a plan if the State plan is inadequate

If a State fails to submit an implementation plan or if the Administrator determines a State plan, or any portion thereof, not to be in accordance with the requirements of section 110, the Administrator "shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for [the] State . . . ." Clean Air Act, 110(c). If the State fails to submit an approvable plan within the time specified in the law, the Administrator must promulgate the Federal plan. Id.

2. A promulgated plan must meet the ambient air quality standards. The plan must satisfy the criteria of section 110(a)(2). The Administrator is authorized to promulgate whatever measures are needed for these purposes.

a. Standards

In order to be the "applicable implementation plan" for purposes of enforcement by the Administrator under section 113, the approved or promulgated plan must be one "which implements a national primary or secondary ambient air quality standard in a State." §110(d).

The "Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970" inserted into the Congressional Record by Senator Muskie, provided:

> *The Administrator has six months* to approve a submitted implementation plan or if no plan is submitted or the plan is inadequate, *to substitute a plan of his own.* *The plan must be designed to achieve the level of air quality established by the primary standard within three years,* and must include a description of steps which will be taken, including transportation and land use controls, emissions requirements, and other enforcement procedures. 116 Cong. Rec. S20600 (daily ed. Dec. 18, 1970) (emphasis added).

b. Criteria

The original House bill contained provisions similar to the present Act which, it was explained on the House floor, provided that "the Secretary himself may institute *an acceptable plan*" if the State failed to do so. 116 Cong. Rec. H5346 (daily ed. June 10, 1970) (remarks of Mr. Quillen, emphasis added).

The most clear-cut statement of this responsibility is contained in the Section-by-Section Analysis in the committee report accompanying the Senate bill which was, in all respects relevant here, the same as the bill eventually enacted. Concerning the provision for promulgation of a federal plan, the Analysis provided:

> Regulations published and promulgated by the Secretary must be *consistent with the criteria set forth in subsection (a)(2) of this section.* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 55 (1970) (emphasis added).

The criteria referred to were the ones which an appropriate State plan must meet.

c. Authority

Since the Act clearly requires the Administrator to promulgate a plan which will meet the criteria of section 110(a)(2) (to be discussed below in paragraph 3), it must be read as giving him the authority to do so. 1/

1/ Any doubts which may remain are resolved by the general rulemaking authority given the Administrator in section 301(a): "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."

Prior to the passage of the House and Senate versions of the bill which later became the Clean Air Act, the federal power to promulgate a plan was described by proponents in various ways. "[T]he Federal Government will step in and establish a plan for such State." 2/ "[T]he Federal Government will take over and make rules and regulations amounting to a State plan." 3/ "[T]he Secretary himself will have the authority to go in and set the plan." 4/ "The Committee bill . . . would provide for the substitution of Secretarial authority . . . ." 5/ "[T]he Secretary must have the authority to replace all or any portion of any implementation plan . . . ." 6/ It appears, then, that the authority to promulgate is as broad as needed to meet the national standards and the other criteria of section 110. Nowhere in the Act or its history is there the slightest indication that Congress intended to limit the authority of the States or the Administrator with respect to the adoption of measures needed to fulfill the purposes of the Act, namely, the attainment and maintenance of the national ambient air quality standards.

3. The criterion of section 110(a)(2)(B), which provides that plans contain such other measures as may be necessary . . . including . . . transportation controls," is broad enough to encompass whatever measures are necessary to achieve the purposes of the Act.

The Clean Air Act's criteria for an approvable plan include:

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of [the] primary or secondary standard, including, but not limited to, land-use and transportation controls . . . . §110(a)(2)(B).

Since "transportation controls" are among the tools available to the States or the Administrator in devising an implementation plan which would achieve the national standards, the legislative history can also shed some light on what the term was intended to encompass. The excerpts below do not specifically refer to EPA-promulgated plans, but were made in general discussions of the contents of plans.

The Senate committee said that an implementation plan

> should insure . . . that moving sources will be located and operated so as not to interfere with the implementation, maintenance, and enforcement of any applicable air quality standard or goal. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

2/ 116 Cong. Rec. H5352 (daily ed. June 10, 1970) (remarks of Mr. Staggers).
3/ Id. (remarks of Mr. Springer).
4/ Id. at H5356 (remarks of Mr. Rogers).
5/ S. rep. No. 91-1196, 91st Cong. 2d Sess. 12 (1970).
6/ Id. at 14.

The committee indicated that it realized "that changes or restrictions in transportation systems may impose severe hardship on municipalities and States . . . ." *Id.* at 13.

> Some regions may have to establish new transportation programs and systems combined with traffic control regulations and restrictions in order to achieve ambient air quality standards . . . . *Id.*

The Committee urged that other Federal agencies cooperate to alleviate the hardship through "any relevant program assistance." *Id.*

The same committee seems to have specifically foreseen a situation as drastic as that in Los Angeles, at least for the short term:

> The bill recognizes that a generation--or ten years' production--of motor vehicles will be required to meet the proposed standards. During that time, *as much as seventyfive percent of the traffic may have to be restricted in certain large metropolitan areas if health standards are to be achieved within the time required by* this bill. *Id.* at 2 (emphasis added).

Senator Muskie, the chief architect of the Act, said that the ambient standards

> will require that urban areas do something about their transportation systems, the movement of used cars, the development of public transit systems, and the modification and change of housing patterns, employment patterns, and transportation patterns generally. 116 Cong. Rec. S20603 (daily ed. Dec. 18, 1970).

He also envisioned, "Central city use of motor vehicles may have to be restricted." *Id.* at S20600.

The above excerpts make clear that, at least with regard to State-submitted plans, the term "transportation controls" encompasses whatever regulation of motor vehicles is necessary to achieve the necessary improvement in air quality. It is our conclusion that the same broad scope applies to EPA-promulgated plans. Thus, emissions from individual cars may be limited, as well as the use of the cars and the "vehicle miles traveled." 7/

7/ Agency regulations promulgated in August 1971 required that each implementation plan "set forth a control strategy which shall provide for the degree of emission reduction necessary for attainment and maintenance of the national standard," 40 CFR §51.14(a)(1), and defined "control strategy" to include:

> (4) Changes in schedules or methods of operation of commercial or industrial facilities or transportation systems . . . .
>
> (5) Periodic inspection and testing of motor vehicle emission control systems . . . .

DISCUSSION

4. Under section 110(a)(2)(B) the Administrator may promulgate measures to reduce emissions of pollutants from individual vehicles (retrofits, gaseous fuel conversion, periodic testing and/or inspections) and measures to reduce the number of vehicles (registration limits) or the number of miles traveled by vehicles (rationing, parking restrictions, road-use restrictions). (Question #1)

Generally, pollution can be lessened either by the reduction (or cleansing) of emissions from individual sources or by the reduction of the use (operation) of the sources. 8/ Both techniques have been used by the States and by the Administrator in regard to stationary sources, and have long been considered as proper controls under section 110(a)(2)(B).

Each control techniques discussed below for mobile sources would qualify as the type of control authorized or required by section 110(a)(2)(B), but the imposition of "fees" or price increases may be less likely to withstand judicial review. In this paragraph, the controls are discussed as they would be imposed by EPA upon the mobile sources. In paragraph 6 the issue of requiring the State to institute and enforce the controls is discussed.

a. Cleansing of emissions from individual sources

A regulation requiring that emissions of pollutants from an individual source be reduced through cleansing can take two general forms. It can specify

---

(footnote 7/ continued from previous page)

> (6) Emission control measures applicable to in-use motor vehicles, including, but not limited to, measures such as mandatory maintenance, installation of emission control devices, and conversion to gaseous fuels.
>
> (7) Measures to reduce motor vehicle traffic, including, but not limited to, measures such as commuter taxes, gasoline rationing, parking restrictions, or staggered working hours.
>
> (8) Expansion or promotion of the use of mass transportation facilities. . . .
>
> (9) Any land use or transportation control measures not specifically delinerated herein.
>
> . . . .
>
> Id. at §51.1(n).

8/ A third technique is to disperse or redistribute pollution. In this category are control techniques such as relocation of stationary sources to less polluted areas and the redistribution of traffic from one part of a city to another. It is possible that neither of these would, however, be permitted if the non-degradation decision of Sierra club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd, _____ F.2d _____ (D.C. Cir., Nov. 1, 1972), cert. granted (Jan. 15, 1972), is affirmed by the Supreme Court.

the amount of a pollutant that may be emitted (either in absolute terms, such as tons per hour, or in terms of the required reduction, such as an 85% reduction), or it can specify the control equipment which must be installed. The first of these is clearly an "emission limitation" within the meaning of section 110(a)(2)(B). If the second is not an emission limitation, it is an "other measure" under that section. Both techniques are used for stationary source control, and both are applicable for mobile source controls. Inspections or testing can be used in support of either technique.

(1) Emissions Limitations or Standards

Emissions standards for new vehicles are set by the Agency pursuant to section 202 of the Act. States generally are preempted from setting such standards by section 209, but they may set standards for other vehicles at a reasonable time following initial retail sale. 9/ If necessary, the Administrator could promulgate a provision for an implementation plan setting such standards for in-use vehicles under section 110(a)(2)(B). This would be identical to already-promulgated requirements that stationary sources limit pollutant emissions to specified amounts. 10/

(2) Retrofits and Gaseous Fuel Conversion

A requirement that vehicle owners install retrofit devices approved by the Administrator would also be authorized under section 110(a)(2)(B) and would be identical to the requirement that stationary source owners install control equipment approved by the Administrator. 11/

(3) Inspections and Testing

Although "inspections" and "testing" are aften conducted as part of the same program, there are two different kinds of action which deserve separate labels. An "inspection" may denote an examination to determine whether control systems are installed, operating, and properly adjusted. A "test" may denote a sampling of emissions to determine whether they fall below a standard applicable to the class of vehicles involved. 12/ Either or both can be required under section 110(a)(2)(B).

9/ *See* memorandum from John E. Bonine to Joel Horowitz and Ronald Venezia, "Transportation Controls," August 11, 1972, at 5, note 11.

10/ See, e.g., 37 *Fed. Reg.* 15094, 15098 (July 27, 1972) (zinc smelters, Idaho).

11/ The Administrator has promulgated requirements for Louisiana that waste gas disposal systems of a certain size must incinerate the waste gas stream "by a smokeless flare or other *device approved by the Administrator.*" 37 Fed. Reg. 23085, 23097 (Oct. 28, 1972) (emphasis added).

12/ Inspection and testing of stationary sources is carried out under section 114 of the Act.

Separate authority for testing to meet emission standards can be found in section 110(a)(2)(G), which recites that one of the criteria which must be met by an applicable implementation plan is that

> it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards 13/

b. Reductions or limitations on the operation of mobile sources

The transportation problem in some regions cannot be solved at this time simply by reductions in the emission of pollutants from individual vehicles through "retrofit" devices. In these regions, reduction in the vehicle miles traveled (VMT) provide the only means for adequately reducing overall pollutants emitted into the ambient air. Similarly, since growth in the number of sources can offset any emission control device which is less than 100% effective, some procedure for identifying new sources and for limiting both their number and the amount of their operation is clearly appropriate in order to maintain the ambient standards.

Methods of achieving these reductions, or limitations in VMT are classically called "transportation controls," which the legislative history indicates that Congress intended if necessary. (See paragraph 3, supra.) The only questions in this area relate to exactly which means are appropriate to achieve them. Methods which have been suggested include limitations, reductions or use requirements for gasoline, parking spaces, road space (bus lanes) 14/ and vehicles registered. Each of these may be accomplished directly through regulatory provisions, or indirectly through raising their cost either by "minimum price control" or "use fees." Our conclusion, spelled out below, is that the direct means are preferable.

(1) Registration limits imposed on individuals

Sections 110(a)(2)(D) and 110(a)(4) of the Act require that implementation plans contain authority to prevent the construction or modification of any new source "to which a standard of performance under section 111 will apply." Since that requirement alone would not insure maintenance of the ambient standards, EPA regulations pursuant to section 110(a)(2)(B) require that a

---

13/ To apply an inspection system under this subsection to all vehicles it must be assumed that "applicable emission standards" refers not only to the Federal standards for older cars under an implementation plan. The use of this subsection would seem to require an emission standard "applicable' to each class of vehicles required to be inspected.

14/ Note that the vague term "mandatory car pooling" is not used here. Without specification of enforcement measures, the term has no meaning. "Mandatory car pooling" could be enforced through restrictions on non-carpools on freeways and in parking. No other type of regulation seems viable. Of course, all measures to reduce VMT can be expected to result in increased car-pooling.

State have authority to block any stationary source if its emissions will "prevent the attainment or maintenance of a national standard.15/ The Administrator has promulgated provisions of implementation plans allowing him to limit the number or kind of stationary sources in some instances. 16/ An equivalent procedure for mobile sources would be a procedure for EPA registration of vehicles, with a limitation on the number of vehicles registered within a region. Such a procedure would be authorized under section 110(a)(2)(B) to attain and maintain the ambient standards. A reduction in the number of automobiles registered might be legally supportable, but would present other problems which make it an unlikely policy choice.

(2) Limitation or reduction in gasoline use and requirement for allocation (rationing)

As pointed out above, the Act authorized the imposition of "such other measures as may be necessary." Limiting the number of vehicle miles traveled by the use of fuel limitations would be one such measure. 17/ The fact that the lack of gasoline will cause motorists to curtail driving is not a ground for finding that the promulgation of gasoline rationing is beyond the statutory power of the Administrator. As the Senate Report stated, in discussing the possible consequences of controls on stationary sources under the Senate version of the bill that later became the Clean Air Act Amendments of 1970, the Committee "determined that existing sources of pollutants either should meet the standard of the law or be closed down." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 3 (1970). Expectations of similar major restrictions on traffic were quoted earlier in this memorandum.

The objection that sellers of the polluting fuel should not be regulated, but only the actual user, lacks force under the Act. Congress specifically recognized the need in some situations to regulate the seller of a polluting fuel. (See section 211(c)(1).) Moreover, if necessary for administrative reasons, it is appropriate to impose requirements on non-polluters whose activities are elements in a chain which results in pollution by others. Again,

---

15/ For a discussion of the legal basis in section 110(a)(2)(B) of this expanded requirement, see Memorandum from G. William Frick to Thomas B. Yost, "Preconstruction review authority required for implementation plans," February 2, 1972.

16/ See, e.g., 37 Fed. Reg. 23085, 23087 (October 28, 1972) (Louisiana).

17/ The leading case involving World War II rationing was L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, 64 S.Ct. 1097, 1100 (1944), in which the question of constitutional power was not discussed, but assumed. Several lower court decisions upheld the rationing. For example, in O'Neal v. United States, 140 F.2d 908, 911-12 (6th Cir. 1944), the court held that the power to ration could be delegated to the executive. The court explicitly stated that the constitutional basis for the rationing was the legislative power of the Congress, not the war power of the President. The only question, then, is whether the Clean Air Act's words are broad enough to grant the rationing power to the Administrator.

the Act does not confine its authority to emission limitations, but extends to "other measures."[18]

Gasoline "rationing" should not be viewed as necessarily involving coupons. If gasoline rationing were instituted at the supplier level without other provisions, issues of allocation and price level would be left unresolved. These can be dealt with in several ways: by allowing prices to rise due to reduced supply, but permitting the market economy to allocate the remaining supply; by allowing prices to rise and the market economy to allocate the supply, but levying "fees" on the sellers to absorb the windfall profits that would otherwise occur; by imposing maximum price controls and permitting allocation to be handled on a first come-first served basis; or by issuing coupons to consumers for the allocation of supply (trational rationing), which would also tend to keep the price down due to lessened demand for legal gasoline. It should be pointed out that there may be no obligation for EPA to choose among these alternatives. The choice could be left up to the State, with EPA simply restricting the overall supply available. Indeed, it may be argued that to go further than the simple restriction on overall supply may be unnecessary and thus not authorized (*see* paragraph 5, *infra*). The scheme of the Act tends to support maximum State decision-making.

---

[18] In addition, section 211(c)(4)(c) provides:

> a State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 110 so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements.

This subsection may be read either as granting authority to the Administrator or as recognizing that he has such authority under other provisions of the law--presumably section 110, but possibly section 211 (c)(1). In any case the result is the same. If, however, his authority stems from section 211(c)(1), he may be required to make the findings required by other subsections of section 211(c), namely that the "emission products of such fuel ...will endanger the public health or welfare," §211(c)(1)(A) (a standard more stringent than the requirement that ambient air quality standards "protect" the public health and welfare, §109(b)), that he has considered "all relevant medical and scientific evidence available to him," §211(c)(2)(A), and (to the extent rationing is viewed as a prohibition rather than as a control) that "such prohibition will not cause the use of any other fuel...which will produce emissions which will endanger the public health or welfare to the same or greater degree," §211(c)(2)(C).

Although there is no indication in the legislative history that Congress specifically envisioned that this subsection might be used as the basis for rationing gasoline, the words of the statute are broad and would prove difficult to be read as not encompassing such power. The control or prohibition provided for by this subsection is for the "purposes of motor vehicle emission control."

(3) Limitations or reductions in private parking spaces and requirements for allocation

Since the existence of private parking spaces is a direct incentive and precondition to automobile travel, the Administrator could order a limitation or reduction in their number under section 110(a)(2)(B). The limitation of new construction would be similar to any other "new source review" provision of a plan. The reduction would be based on the same rationale as gas rationing, with the same consideration arising as to whether EPA should dictate a method of allocation. 19/

(4) Limitations, reduction, and allocation of road space (bus and carpool lanes, restricted access) or public parking

The existence of plentiful road and public parking space is, of course, an incentive to automobile travel. Limitations, reductions, or required allocations would be mandated on the ground that they can be considered polluting facilities of the State. (For further discussion of this rationale, *see* paragraph 6, *infra.*) A limitation on the construction or modification of roads and public parking facilities would be identical to any other "new source review" under section 110(a)(2)(B) if necessary. The notion of such a limitation with regard to highways can also draw some support from section 109(j) of the Federal Aid Highway Act:

> The Secretary [of Transportation], after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended. Pub. L. No. 91-605, 84 Stat. 1735, 23 U.S.C. §136(b).

19/ For example, it has been suggested that employers be required to "institute" car pooling and make their parking lots available only to persons in car pools. However, the goal of reducing the number of vehicles driven could be achieved simply by requiring a specified reduction in spaces. It may be argued that a business should be left to decide how to allocate its remaining parking spaces among its employees, subject of course to State regulations, and that for EPA to specify "carpooling" as the system of allocation goes beyond what is necessary to achieve the reduction. On the other hand, a more acceptable EPA regulation might be one which gave each employer a choice--either to limit (or reduce) the number of spaces outright or to impose allocation requirements which resulted in a usage limitation (or reduction).

Although the Department of Transportation's guidelines have not been promulgated, consultation with EPA has begun on their content.

A reduction in public parking space (e.g., on-street parking) is justifiable just as with private parking. Again, allocation of remaining spaces might best be left to the State as the owner of such facilities.

Reduction in road and highway facilities outright are unlikely, but EPA could offer the State this choice: either reduce the overall facilities available or impose allocation requirements which EPA believes will result in the necessary usage reduction. (The offering of this choice avoids the objections to EPA allocation decisions, discussed under gasoline rationing, paragraph 4b(2), pages 13-14, supra.) Such allocation requirements could include bus and carpool lanes, as well as restricted access for certain vehicles during certain hours. 20/

Such changes in normal transportation patterns may have been envisioned by Senator Muskie, the principal author of the Act:

> If such [transportation] controls are required, the committee believes the plan for implementation should so provide. If the plan is approved, Congress expects the Federal regulatory agencies to take the steps necessary to assure compliance with the plan; because what is involved in these greater urban areas is the whole complex of residential patterns, and transportation patterns--the way in which people move about, go to their work, and live--and all of this ought to be subject to modification, and must be modified if the objective of clean air is to be achieved. 116 Cong. Rec. S20609 (daily ed.) (December 18, 1970).

(5) Raising the cost of vehicle ownership, gasoline, parking, or road use by price controls or use "fees"

A more indirect method of encouraging a reduction in vehicle miles traveled and maintaining the reduction would be the imposition of stringent "minimum price controls" or stringent "use fees" on gasoline, parking, road use, or vehicle ownership. Such measures raise three questions: (a) Are they constitutional? (b) Are they a power granted to the Agency by the Clean Air Act? (c) Are they "unnecessary" controls? It is difficult to predict what grounds a court would choose for striking down a regulation which it found onerous, but these measures do seem less certain of being upheld than the direct restrictions discussed above.

20/ This restriction on the operation of certain vehicles during smog-prone hours of the day may be more defensible than a plan for imposing "staggered work hours" or a four-day work week. See subparagraph 4b(6), infra. p. 18.

(a) Constitutional issues

There is a possibility that such fees would be ruled in a lower court as an unconstitutional delegation of Congressional authority "to lay and collect taxes."21/ Constitution, Art. I, Section 8, Clause 1. However, the courts have shown themselves willing to view such impositions as a sanction rather than a tax if regulation is the primary purpose of the statute, 22/ and thus within the range of possible delegation to an agency. (In most instances, however, the statute itself has established the sanction or fee.) Delegations of price control authority are commonplace and would appear to raise no constitutional question. 23/

(b) Statutory authority

It may effectively be argued that such fees are simply another control measure authorized by section 110(a)(2)(B) of the Clean Air Act. While it is not possible to say with assurance that they are not within section 110(a)(2)(B), a court could hold that the delegation of such power should be spelled out specifically rather than generally. Nonetheless, it is true that in United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480 (1911), the Court sustained the power of the Secretary of the Interior to establish a fee for grazing sheep in the national forests, finding both constitutionality and sufficient Congressional intent in one act which simply gave the Secretary the power to make rules "to insure the objects" of the national forests, to regulate their occupancy and use, and to preserve them from "destruction," and perhaps relying on another act which indicated that "[a]ll money received from. . . the use of any land . . . shall be covered into the Treasury of the United States." Id. at 484, 481. Price control authority has been delegated to several agencies by Congress, but no cases have been found either affirming or rejecting the proposition that prices may be controlled under a broadly worded statue like the Clean Air Act which does not itself mention prices. A potential conflict between putative EPA authority and authority of other price control agencies might also cause a court to look skeptically at EPA's claim.

21/ However, non-delegation is not a doctrine with much force today. "In only two cases in all American history have Congressional elegations to public authorities been held invalid" [by the Supreme Court]. 1 Davis, Administrative Law Treatise at 76, §2.01.

22/ See, e.g., Rodgers v. United States, 138 F. 2d 992, 994 (6th Cir. 1943), aff'd, 332 U.S. 371, 68 S. Ct. 5 (1947). In this case, a penalty fee of three cents for each pound of cotton sold in excess of a farmer's quota was involved.

23/ For prices in general, Economic Stabilization Act of 1970, 84 Stat. 799, transportation by air, 49 U.S.C. §1373, transportation by rail, 49 U.S.C. §15, transportation by motor carrier, 49 U.S.C. §316, foreign trade, 49 U.S.C. §§1336, 1338, 1351, natural gas production, 15 U.S.C. §717d, and agriculture, 7 U.S.C. §§1441, 1446.

(c) Issues of reasonableness, necessity, and effectiveness

The most serious problem with the use of indirect means of control depending upon raising the cost of automobile travel is that a court may find them to be unnecessary and not as effective as direct controls. (This requirement of reasonableness or necessity is discussed in paragraph 5, infra.) Since the direct controls discussed above are fewer steps removed from their result, they may be seen as more easily reconcilable with the statutory language of section 110(a)(2)(B). The use of direct controls would eliminate the need for a court to resolve potentially troublesome constitutional or statutory questions of taxation versus fees, of price controls by an environmental agency, and of whether these indirect means were envisioned by Congress. The use of indirect controls would run the risk that a court would dispose of a case adversely to the Agency on these other grounds, rather than confronting the key issue of the capability of section 110(a)(2)(B) to effect reductions in vehicle miles traveled.

(6) Staggered work hours, four-day week

In some regions, a temporal redistribution of hydrocarbon emissions might result in lower peak concentrations of pollutants. Such a redistribution might be effected by "staggered work hours" or by prohibiting the operation of certain vehicles during smog-prone hours of the day.

Actual restrictions on vehicle operation during certain hours is clearly a more direct method of control, as compared to restrictions on work-hours which are expected to result in reduction on vehicle operation during those hours. (Admittedly, it may be easier to enforce the staggered work-hours; nevertheless, it is an indirect control, one step removed from the actual purpose of affecting vehicle operation.) Consequently, although either method might be defensible by itself, a court might be less willing to uphold the staggered work-hours if the direct restrictions on vehicle operation were available, since the latter may involve less disruption to non-transportation aspects of economic and social activity.

5. The Administrator's authority to promulgate measures is limited by a requirement of reasonableness

In the approval of State implementation plans the Administrator is not faced with the question of the wisdom of the means which the State has chosen to meet the national standards. (Indeed, a State's authority to adopt or enforce emission standards, emission limitations, or requirements more stringent than necessary is specifically preserved by section 116.)

On the other hand, the Administrator's authority to promulgate regulations setting forth a plan exists only for the purpose of achieving the standards and meeting the criteria of section 110(a). Authority to promulgate regulations stricter than necessary to accomplish that purpose cannot be inferred from the law. Similarly, under section 301(a) the Administrator's authority exists only to prescribe such regulations as are necessary "to carry out his functions under this Act." If one possible measure involves much greater impact on the community, is too indirect, seems unfair, or seems beyond the range of normal agency action, then a court may well hold that it is not "necessary" if less objectionable or less indirect measures could have been promulgated, even though either achieves the same degree of emission reduction and that reduction itself is "necessary."24/ The former of the two measures may also be considered "arbitrary and capricious" under the Administrative Procedure Act in light of the available alternative measure.

6. A state may be required to implement transportation controls (Question #2)

In the absence of some authority to require the State 25/ itself to implement many of the necessary transportation or emission control measures, with appropriate sanctions under section 113 for failure of the State to comply, the Clean Air Act would contain a gigantic loophole through which any State could escape the expenditure of necessary enforcement funds to achieve the national standards.

Mr. Staggers described the House version of the bill thus during June 1970 debates:

> If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the mea to do the actual enforcing. 116 Cong. Rec. H5350 (daily ed. June 10, 1970) (emphasis added.)

The most workable theory under which to require a State to implement the required transportation or emission control measures appears to be that the roadways and public parking lots or spaces are public facilities for whose emissions the State is responsible. This office has previously stated that where "emissions of dust from roadways" under the ownership 26/ of a State or locality prevent the attainment of the national standards for particulate matter,

> we believe that EPA may directly require the State or locality to take specified actions. These roadways are public facilities and, in our view, requiring State to take measures to control emissions from them is similar to requiring a municipality to control emissions of pollu-

---

24/ Indeed, EPA regulations specifically indicate that a State in drawing up its plan may take into consideration "the cost-effectiveness of [any given] control strategy in relation to that of alternative control strategies" and "the social and economic impact of the control strategy...." 40 CFR §51.2(b), (d). The Administrator may and, we feel, must do the same.

25/ The word "State" as used in this paragraph includes cities, towns, counties, and political subdivisions, since they owe their legal existence to State law.

26/ The memorandum actually said "under the jurisdiction," but ownership rather than political jurisdiction was the basis of the concept.

> tants from its municipal incinerator . . . . Memorandum from Michael A. James to Edward J. Lillis, "Authority to Require States to Pave roads and Implement Speed Controls," January 23, 1973 (emphasis added).

Although dust actually originates on the road surface, and is simply made airborne by passing vehicles, one could also view as "emissions . . . from roadways" the pollutants left in the vicinity of the roadway by exhaust emissions from passing vehicles. While the issue is not free from doubt, we believe that it is not necessary that the pollutants originate in the roadway or public facility; it is sufficient that they are generated by vehicles while on the premises. We believe that the owner or operator of the highway or parking lot be required to reduce emissions from such vehicles operated thereon even though the vehicles are owned and operated by others. In a similar situation, a shopping center or factory owner could be required to limit parking or to restrict it to low-polluting vehicles if emissions on its parking lots or roads were causing the ambient standards to be violated. 27/

An obvious example of treating the state's roadways as a source would be the promulgation of limitations or reductions in road space or allocations of usage thereof (discussed in paragraph 4b (4), pp. 14-15, supra.) More unusual, but still defensible we believe, would be the promulgation of requirements that the State limit the amount of usage (rationing gasoline or numbers of vehicles registered) or requirements that the State allocate the privilege of using its roads only to vehicles complying with specified emission cleansing measures (retrofits, inspection-maintenance).

Not to require the State to implement the transportation controls would raise--in addition to the practical problem discussed above concerning limited EPA resources--the specter of senseless duplication of program by the State and the Federal Government. To have a system of EPA traffic policemen, EPA inspection personnel and stations, and EPA vehicle registration procedures would subject citizens to repetitive and at times conflicting requirements. The State and localities already have police, safety inspections, and vehicle registration requirements. It cannot be concluded that Congress intended duplication of all these State programs to result from a State's failure to include adequate transportation controls in its plan.

On balance, it appears that an implementation plan promulgated by the Administrator can require a State or its political subdivisions to impose most of the transportation controls outlined above in paragraph 4, and violation of such requirements by the State can be subject to enforcement under section 113 of the Act.

27/ It is also worth noting that the notion of prohibiting the construction or modification of a so-called "complex source" may even go beyond our theory of regulating a State's transportation "facilities", by regulating even those facilities which neither generate pollution nor necessarily provide the physical location on which the pollution occurs. A highway appears to be more than a "complex source", in fact, it is an actual source.

The Clean Air Act does not appear to address the notion that requirements might be imposed upon State or local officials solely because the government of a State has jurisdictional responsibilities. Clearly, requirements may be imposed upon--and enforced against--persons or bodies who are the owners and operators of pollution sources (including the State as owner of polluting facilities 28/). It is not possible to say definitely whether the Act grants the authority to impose requirements on non-polluters--either private individuals or the State government--although we believe requirements may be imposed where the non-polluter can be shown to be involved in the polluter's activities or in a chain of events resulting in pollution. 29/ We are unable to say definitely whether a State may be required to take action under a plan simply because the plan is supposed to go into effect within the boundaries of the State. For this reason, we believe it is preferable that promulgated plans not make a State responsible for pollutant emissions from private roads or parking lots, or for rationing private parking spaces. We find it preferable to limit such requirements to those State activities or facilities which can be said to be involved in the production of the pollution.

7. The Administrator cannot require the State to expand mass transit facilities, but he may include provisions for Federal assistance in a promulgated plan.

Congress tends to offer either the carrot of financial inducement or the stick of federal preemption to prod a State into carrying out a program, but not to command a State government to solve a problem in a certain way or to mitigate the consequence of Federal attempts to solve the problem. We see no way in which a State or local government may be commanded in a Federal implementation plan to provide, for example, adequate mass transit. There is no indication in the legislative history that Congress foresaw the use of section 110 in such an unusual manner. In light of possible constitutional questions and in the absence of a clear directive from Congress, we cannot say that the Agency should proceed under such a legal theory.

On the other hand, a Federal plan could and probably should evidence careful consideration of all of the measures needed to make the plan work such as mass transit, without imposing any requirement for implementing such measures.

28/ The Act provides that the Administrator may seek civil injunctive and penalty relief against "any person" who is "in violation of any requirement of an applicable implementation plan." §113(a)(1). The term "person" includes a "State, municipality, and political subdivision of a State." §302(e). There appears to be no constitutional issue of suing a State. See Memorandum from Rodney G. Snow to John E. Bonine, "Draft Transportation Control Regulations for the Metropolitan Los Angeles Intrastate Air Quality Control Region," December 8, 1972.

29/ Some have argued that the State or locality could be required to implement transportation controls simply because no other body can effectively implement them. Others have argued that a Federal regulation must be enforced by State officials simply because of the supremacy of Federal law. On balance, we believe it is better to rely on the ownership rationale or chain-of-events rationale outlined above.

The Agency's plan could call upon other agencies, Congress, and the State to make the facilities available and to build the system.

A State implementation plan must contain "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan." §110(a)(2)(F). Agency regulations provide:

> Where a plan sets forth a control strategy that provides for application of (1) inspection and testing of motor vehicles and/or other transportation control measures or (2) land use measures ... such plan shall set forth the State's timetable for obtaining such legal authority as may be necessary to carry out such measures. 40 CFR §51.11(b).

Therefore, it may be proper for an Agency plan to suggest a timetable "for obtaining such legal authority as may be necessary to carry out such measures" as mass transit systems. It may similarly be appropriate for an Agency plan to indicate that the need for funding, personnel, and authority would be brought to the attention of Congress. Although these portions of the plan may not be very significant legally, an Agency plan which called for drastic reduction in automobile traffic without any indication of alternative transportation is unrealistic and would undoubtedly be resisted. Indeed, it could be argued that a plan which called for alternative transportation would not "insure" attainment of the standards due to expected evasion of the laws by motorists, and thus is neither approvable (if submitted by a State) nor adequate for promulgation.

In addition, the Agency has not required that the State air pollution control agency itself be able to enforce every element of an implementation plan. Plans have been accepted whose enforcement depends upon the action of Attorneys General who may not necessarily be sympathetic with the goals of the plans and who may not have been appointed by, nor are they responsible to, the Governors who have submitted the plans. It would therefore seem both appropriate and legally proper for an EPA-promulgated plan to contain provisions which depend upon the cooperation of other Federal and State agencies. Such provisions would not be a substitute for imposing requirements to the limit of EPA's authority, but they would be worthwhile additions. Senator Muskie said:

> If the plan is approved, Congress expects the Federal regulatory agencies to take the steps necessary to assure compliance with the plan. 116 Cong. Rec. S20609 (daily ed. Dec. 18, 1970).

In fact, the cooperation of the Department of Transportation was specifically mandated by section 109(j) of the Federal Aid Highway Act, quote in paragraph 4b(5) of this memorandum, p. 15, supra.

The Senate committee urged the agencies of the Federal Government to make assistance available. "The highway program, various housing and urban development programs and other sources of assistance should be examined in this connection." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 13 (1970).

§ § § § § § §

TITLE: Legal Authority to Require State and Local Officials to Submit Compliance Schedules for Transportation Controls

DATE: April 18, 1973

MEMORANDUM OF LAW

FACTS

Because it has been generally concluded by the Los Angeles Task Force that a transportation control plan depending solely upon gasoline rationing would be unworkable, a mixture of measures is under consideration, including such features as requiring state and local governments to make modifications to streets and highways favoring buses and carpools and disfavoring single-passenger automobile travel. EPA could theoretically design from scratch and enforce a complete system for the entire South Coast Basin. However, this would result in one more layer of planning authority on top of existing authorities, possible conflict with State, local, and DOT plans, and the possible inclusion of inadequate and irrational measures in the implementation plan.

This Memorandum outlines the legal basis for a framework within which State and local decision-making could be utilized in large degree to determine the specifics of a sensible plan for Los Angeles; there would, as required by the Clean Air Act, be no option left to them to decide whether to have specified changes in their transportation patterns. [1]

QUESTION

Does the Administrator have the authority to promulgate and enforce an implementation plan provision requiring appropriate governmental authorities to submit, by a date certain, a compliance schedule for the modification of streets, highways, or other facilities owned or operated by those authorities?

ANSWER

Yes. A plan should contain, *inter alia*, "emission limitations, schedules, and timetables for compliance with such limitations." §110(a)(2)(B) of the Clean Air Act. In addition, it should contain "such other measures as may be necessary" to attain and maintain the national standards. §110(a)(2)(B). The complexity of the problem may make it necessary to require a source owner to draw up its own proposed compliance schedule, and the State or locality may be treated as such a source owner with regard to its streets and highways. We believe a legally supportable position would be that a provision requiring that such a compliance schedule be submitted would be a proper "requirement" of the applicable implementation plan, enforceable under section 113.

---

[1] The conclusions outlined below are equally applicable to requiring compliance schedules in several other areas including an inspection system, a retrofit or conversion program, registration limits, emission or gasoline taxes, etc.

DISCUSSION

1. The plan promulgated on June 15 might contain some specifics (e.g., bus lanes decreed for a few recognizable freeway corridors), but would largely contain requirements that identifiable governmental authorities--in their role as the owners and operators of emission sources, namely the highways [2] --submit proposed compliance schedules for obtaining emission reductions according to named criteria, by a date certain (e.g., September 15, 1973).

Failure of the government authorities to submit adequate schedules on the specified day would result in legal action under section 113(a)(1), which provides for thirty-day notice, followed by an order to comply or a civil action. Failure to abide by the compliance order could result in a fine of $25,000 per day or imprisonment. Section 113(c)(1).

Upon submission of a compliance schedule, an announcement of its availability would be made in the Federal Register, along with availability of EPA comments. A public hearing would be held, although it could be in only one location. Then the final schedule would be promulgated (or approved as appropriate) in the Federal Register and its provisions enforced according to section 113.

2. The proposed Los Angeles transportation control plan contained some regulatory requirements that certain persons submit compliance schedules to the Administrator "showing how the person will bring his operation into compliance . . . ." Proposed Amendments to 40 CFR §52.229(g), Volatile Organic Compound Loading Facilities, 38 Fed. Reg. 2194, 2199 (January 22, 1973). [3] Requiring a stationary source to submit its own compliance schedule has been a common practice on the part of States. It is not known, however, whether States have taken enforcement action against a source for failure to submit a compliance schedule, or whether the States have in all cases simply drawn up their own.

3. The promulgation of a generalized plan with later promulgation of detailed regulations can be seen as consistent with actions taken by the Agency on May 31, 1972, in which we indicated that a "detailed timetable for implementing the legislative authority, regulations, and administrative policies required for carrying out the transportation control strategy by 1975" had to be submitted by numerous States by February 15, 1973, but that needed legislative authority could be obtained as late as July 30, 1973, and the "necessary adopted regulations and administrative policies needed to implement the transportation control

---

[2] See Memorandum of Law from John E. Bonine to Alan G. Kirk II, "Legal Authority to Promulgate and Enforce Transportation Controls," February 28, 1973.

[3] However, that proposed regulation provided only that failure to file a compliance schedule or abide by its terms rendered another regulatory provision immediately applicable.

strategy" could be submitted as late as December 30, 1973. (See, e.g., 37 Fed. Reg. 10842, 10858 (May 31, 1972) (Districts of Columbia).) 4/

5. Aside from the legal considerations, it is worth noting that since the major reason for California not to have submitted any adequate transportation plan up to this point may be that they are unwilling to take the political heat for it, a federal requirement may result in voluntary compliance. Under a fairly detailed federal requirement, they could claim (accurately) that they are simply abiding by federal law, thereby avoiding local political repercussions for drawing up such details as bus lanes and parking restrictions.

6. The procedure proposed would at the same time follow the requirements of 40 CFR §51.4(a)(1), 37 Fed. Reg. 26310 (December 9, 1972), as to public hearings on State-submitted compliance schedules, and the requirements of section 110(c) of the Clean Air Act, as to publication, hearing, and promulgation of federal implementation plans. 5/

7. Judicial review of the generalized plan could be obtained within 30 days of the June 15 promulgation. Judicial review of a compliance schedule could be obtained within 30 days of its promulgation. §307(b)(§).

§ § § § § § §

TITLE: EPA Brief in Suits Challenging Disapproval of Implementation Plans

DATE: November 1, 1972

The following brief responds to arguments that the Administrator could not disapprove implementation plans without simultaneously issuing findings of fact, a statement of basis and purpose, or other detailed explanation. It is intentionally broader than may be required in any particular case.

4/ It should be noted, however, that the authority for these deferrals of submission of important elements of the transportation control plans is not entirely clear. An important deferral, that of the plans in general to February 15, 1973, was held to be unauthorized in NRDC v. Ruckelshaus, ___ F.2d ___ (Civ. No. 71-1522, January 31, 1973). No challenge has as yet been lodged to the other deferrals, and the Court did not discuss time. However, the States have not been informed by the Agency that the deferral of dates for submission of legislative authority, regulations, and administrative policies are invalid, so presumably, it is Agency policy to attempt to continue such deferrals.

5/ The Act requires the Administrator to "prepare and publish proposed regulations setting forth an implementation plan, corporation thereof . . . ." §110(c). The compliance schedule submitted by the State should be published in the Federal Register or, at a minimum, be incorporated by reference at the proposal stage, and be available to all who contact the regional or national office for a copy.

1. No findings of fact were required at the time of disapproval.

   a. There is no applicable statutory requirement for findings of fact.

   (1) There is no requirement in the Clean Air Act for findings of fact in connection with disapproval of an implementation plan. Nor is there any requirement therein for hearings, which could imply a need for findings of fact. (See Memorandum of Gerald K. Gleason, November 1972.) The only requirement in the Administrative Procedure Act for a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" is contained in 5 U.S.C. §557(c), which is applicable only to adjudication, §§554, 556, and to formal rulemaking "required by statute to be made on the record after opportunity for an agency hearing," §553(c).

   (2) The disapproval of implementation plans is neither adjudication nor formal rulemaking (See Memorandum of Gerald K. Gleason, November 1972.)

   b. This is not a situation where the court should impose a requirement of formal findings on its own.

   (1). "[A]lthough formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417, 91 S.Ct. 814, 824 (1971).

   (2) There is no ambiguity about the Administrator's action. His disapproval of specific portions of the implementation plan was set out with specificity in the Federal Register, as well as his approval of other portions. 37 *Federal Register* 10842 *et seq.* (May 31, 1972).

2. Even if findings of fact are required, such a requirement has been met by the actions of the Administrator.

Unlike most situations where formal findings are required, the approval or disapproval of implementation plans is not an area of great discretion on the part of the Administrator. The Clean Air Act provides that the Administrator "shall approve" each State's plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing, and that it contains provisions for various requirements (including monitoring of ambient air quality, review of location of new sources, intergovernmental cooperation, adequate means to carry out the plan, monitoring of emissions from stationary sources, inspection and testing of motor vehicles, and revision). The only requirements with room for much discretion are that the plan insure expeditious or reasonable attainment and maintenance of the ambient air quality standards. The Administrator has further circumscribed his own discretion and explained in advance the basis on which his decisions would be based by publishing in the *Federal Register* "Requirements for Preparation, Adoption, and Submittal of Implementation Plans. 36 *Federal Register* 15486 *et seq.* (August 14, 1971), 40 CFR Part 51. These included description of the models on which his decisions on attainment and maintenance of the ambient air quality standards would be based. When the Administrator published his approvals and disapprovals of implementation plans or portions thereof, specific findings were made as to the respects in which each disapproved portion had failed to meet the requirements of the regulations previously established, 37 Federal Register 10847-906 (May 31, 1972), and the reasons and basis for his approvals and disapprovals was discussed in several pages, id. at 10842-6. In addition, evaluation reports discussing each State plan in even greater detail were published shortly after the actions of approval and disapproval. 1/ At the end of this process, there could be little doubt in any situation why the Administrator had taken the specific actions which he took. Few federal agency actions have ever been accompanied with as much detailed information and explanation as were the approvals and disapprovals of implementation plans by the Environmental Protection Agency.

3. No detailed explanation was required at the time of disapproval.

   a. There is no applicable statutory requirement that a detailed explanation be published.

   There is no requirement in the Clean Air Act for a detailed explanation in connection with disapproval of an implementation plan. There is no requirement in the Administrative Procedure Act for a detailed explanation in connection with administrative action, apart from the requirement for formal findings in some situations (see paragraph 1, above), and for a concise general statement in connection with informal rulemaking (see paragraph 5, below).

1/ Petitioner may argue that the evaluation reports were issued after-the-fact and therefore are not properly part of the court record. However, those evaluation reports are not an attempt to substitute a new rationale for a defective one as in Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3d Cir. 1969), and Braniff Airways v. CAB, 379 F.2d 453, 465 (D.C. Cir. 1967). Nor are they "appellate counsel's post hoc rationalizations" as in Burlington Truck Lines v. United States, 371 U.S. 156, 168-9, 83 S.Ct. 239, 245-6 (1962). Nor is the action here adjudicatory, as in Burlington, Braniff, and SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943); 332 U.S. 194, 67 S.Ct. 1575 (1947). The reports are simply explanations of administrative action which were already in preparation at the time of disapproval on May 31, and were issued shortly thereafter. They are at least as reliable in showing the basis of agency action as the statements of the agencies which met the informal rulemaking requirements of APA §4(b) (even though issued after the original decisions in denying requests for rehearing, in Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968), and Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 27-8 (D.C. Cir. 1954); the findings or testimony that the Supreme Court suggested might have to be provided by the Secretary of Transportation in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971); the statement that the Court of Appeals asked the Administrator for in Kennecott Copper v. EPA, 462 f.2d 846, 3 ERC 1682 (D.C. Cir. 1972); or the additional findings allowed by the court in the adjudicatory situation in American Farm Lines v. Black Ball Freight, 397 U.S. 532, 90 S.Ct. 1288 (1970).

b. There is no extra-statutory, court-imposed requirement that EPA actions be accompanied by publication of a detailed explanation.

There may be situations where a court needs additional explanation in order to effectuate judicial review of an agency[2] but courts have steered clear of imposing any requirement that the additional explanation (beyond APA requirements) be published as a prerequisite to agency action. In Kennecott the court asked the Administrator for an "implementing statement that will enlighten the court" but avoided invalidating the agency action or requiring the statement to be published in the Federal Register. The court said:

> Particularly as applied to environmental regulations, produced under the tension of need for reasonable expedition and need for resolution of a host of nagging problems, we are loath to stretch the requirement of a "general statement" into a mandate for reference to all the specific issues raised in comments.

462 F.2d at 850, 3 ERC at 1685. (Emphasis added.) The court also said:

> These precedents [Holm v. Hardin and American Airlines v. CAB] establish that in a particular case fairness may require more than the APA minimum, but are not to be taken as suggesting in any way that the court considers the kind of problems involved in environmental regulations to require more than the written submissions specified by Congress.

---

[2] In Kennecott Copper v. EPA, 462 F.2d 846, 850, 3 ERC 1682, 1685 (D.C. Cir. 1972), the court said, "There are . . . contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient . . . ." The court remanded the record to the Administrator "to supply an implementing statement that will enlighten the court as to the basis on which he reached the [secondary air quality] standard from the material in the Criteria." It also said that "in a particular case fairness may require more than the APA minimum. . ." citing two if its previous decisions: In American Airlines v. CAB, 359 F.2d 624 (D.C. Cir. 1966), the court indicated its willingness in particular situations to impose "additional procedural safeguards" but found it unnecessary in that case. Id. at 632. In Holm v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971), the court decided that where tomato importers made a "not insubstantial claim that an effective showing requires oral presentation to Department officials, . . . this right is available to them." Id. at 1016.

Id. at note 18. (Emphasis added.) The "written submissions specified by Congress" are the concise general statements required for informal rulemaking in 5 U.S.C. §553 of the APA. 3/ Id.

4. Even if this is a situation in which a detailed explanation is required, such a requirement was met by the actions of the Administrator.

As discussed in paragraph 2, the actions of the Administrator were accompanied with detailed information and explanation which would exceed even the more stringent requirements for adjudicatory action or formal rulemaking.

5. No statement of basis and purpose was required at the time of disapproval.

There is no requirement in the Clean Air Act for a statement of basis and purpose in connection with disapproval of an implemention plan. The only requirement in the Administrative Procedure Act for a "concise general statement of . . . basis and purpose" is contained in 5 U.S.C. §553(c), which is applicable only to informal rulemaking. However, the disapproval of implementation plans is not informal rulemaking. (See Memorandum of Jeffrey H. Schwartz, November 1972.)

6. Even if this is a situation in which a statement of basis and purpose is required, the decisions of the Administrator should be upheld.

   a. The requirement for a statement of basis and purpose can be met by a minimal of explanation.

In New York Foreign Freight Forwarders and Brokers Association v. Federal Maritime Commission, 337 F.2d 289, 296 (2d Cir. 1964), the court

---

3/ It is also erroneous to infer a requirement for publication of a detailed statement from the following comment by the court: "The provision for statutory judicial review contemplates some disclosure of the basis of the agency's action." 462 F.2d at 849, 3 ERC at 1684. The court cited two cases and they are useful in interpreting the remark. In SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943), the Supreme Court did remand the case to the agency for a new decision, because of inadequate findings, but a formal adjudicatory procedure was involved and the courts were bound to base their review on the SEC's formal findings of fact. (Such cases are now reviewed on the basis of whether they are supported by "substantial evidence" and such findings. See 5 U.S.C. §§557(c), 706(2)(E).) In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971), the Supreme Court did not call for publication of the basis of the Secretary of Transportation's decision; instead it reproved the District Court for relying solely on litigation affidavits in reviewing the Secretary's decision and remanded the case for plenary review by the District Court of the full administrative record that was before the Secretary, supplemented if necessary by additional testimony or by explanations in the form of findings. Since the court in Kennecott did not find any requirement for findings of fact as in Chenery, and did not hold the regulation invalid on any other grounds, perhaps it felt that in an informal rulemaking situation it could go only as far as the Supreme Court had suggested in Overton Park's comparable situation, namely to ask for an explanation to the court for purposes of judicial review.

held to be adequate under 5 U.S.C. §553(c) a mere statement that the regulations promulgated implemented the law and had as their purpose the establishment of standards and criteria which were to be followed by certain shipping concerns in the conduct of their business affairs. In Kennecott Copper v. EPA, 462 F.2d 846, 848, 3 ERC 1682-1683 (D.C. Cir. 1972), the following statement satisfied the court for the purpose of 5 U.S.C. §553(c):

> National secondary ambient air quality standards are those which, in the judgment of the Administrator, based on the air quality criteria, are requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of air pollutants in the ambient air.

The court noted that the agency need not "provide the same articulation as is required for orders or regulations issued after evidentiary hearings." Id. at 1684.

b. The explanation provided by the Administrator far exceeded the minimum requirements.

As discussed in paragraph 2, the actions of the Administrator were accompanied with detailed information and explanation which would exceed even the more stringent requirements for adjudicatory action or formal rulemaking.

c. Even if the Administrator had made no explanation at all at the time of disapproval, that would be a "purely technical flaw" and would not justify overturning the Administrator's actions.

In Hoving Corporation v. Federal Trade Commission, 290 F.2d 803, 807 (2d Cir. 1961), the court said:

> Regulations so promulgated will not be declared void merely because of a purely technical flaw in failing to include within the Rules themselves a "concise general statement" of basis and purpose. . . . Both the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed.

(Emphasis in original.) Likewise, the basis and purpose of the Administrator's disapproval would be clear from the specific requirements of the Clean Air Act, and from the procedures followed (see paragraph 2). When the substance of agency action is "not seriously contestable" and the outcome on remand would be certain, even in an adjudicatory situation with the much stricter requirements for formal findings, the law "does not require that we convert judicial review of agency action into a ping-pong game" NLRB v. Wyman-Gordon Co., 89 S.Ct. 1426, 1430 (1969) (plurality opinion).

7. No additional explanation is needed by this court in order to provide effective judicial review.

In some situations, a court may need additional explanation in order to effectuate judicial review of agency action. 4/ In those situations, it is appropriate for the court to ask the agency for additional explanation, as done in *Kennecott Copper* v. *EPA*, 462 F.2d 846, 3 ERC 1682 (D.C. Cir. 1972), and as done by the District Court after a suggestion by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825 (1971), *on remand*, -- F.Supp. -- , 3 ERC 1510 (W.D. Tenn. 1972).

In *Kennecott* the original explanation of the agency had been minimal, and in *Overton Park* the court indicated that the bare administrative record might not disclose the factors that were considered. Neither of these situations exists here, where the Administrator has accompanied his decision with detailed explanations, discussed in paragraph 2.

4/ *See* note 2, *supra*.

STATIONARY SOURCES

SECTION 111 OF THE CLEAN AIR ACT---STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

TITLE: Nondegradation -- Federal Authority

DATE: March 11, 1971

QUESTION

This is in response to your recent inquiry concerning the extent of Federal authority under the Clean Air Act to impose a policy of non-degradation on States. Since no determination of air quality which results in concentrations of a pollutant in excess of a national ambient air quality standard can be permitted, as discussed herein nondegradation refers to the imposition of requirements on sources in areas where air quality is already better than applicable national standards, and where emissions from such sources, if uncontrolled or only partially controlled, would not result in the standards being exceeded.

ANSWER

Our examination of the law, set forth below, indicates that with certain qualifications, there is no legal support for the imposition of the policy by EPA.

DISCUSSION (Legal)

1. Section 111 of the Act authorizes the Administrator to promulgate performance standards applicable to new sources. These standards are to reflect the best system of emission reduction which the Administrator judges has been adequately demonstrated. (§111(a)(1)). Subjecting new sources to standards reflecting the "best available technology", without regard to air quality, is of course, an embodiment of at least one aspect of a nondegradation policy. However, there is no basis in §111 or in the legislative history of that section for extending this policy to other Federal regulatory activity authorized by the Act.

2. Other than its inclusion in §111 standards, there is no specific language in the Act authorizing the imposition of a Federal policy of nondegradation. The only portion of the law which might provide some legal support for it is in §101(b)(1) where Congress stated that one of the law's purpose's is to "... protect and enhance the quality of the Nation's air resource..." [emphasis supplied]. "Protect" means to "shield from injury or destruction."[1] Taken literally, the phrase could be considered to be an indication that Congress intended that existing air quality, no matter how good, be maintained. However,

---

[1] "Webster's Seventh New Collegiate Dictionary" (1965) P. 685.

the quoted statement goes on to provide that the protection of the Nation's air resource is not only to promote the public health and welfare, but to promote "...the productive capacity of its [the Nation's] population." The application of a policy prohibiting any deterioration of air quality, any place in the Nation, without regard to the need to protect the public health and welfare, even on a temporary basis,[2] in consistent with the complete statement of purpose. The absence of specific language authorizing the imposition of the policy and the lack of evidence of Congressional intent that the policy be imposed are determinative of the legal question.

DISCUSSION (General)

1. However, it is worthwhile to consider the general approach of the Clean Air Act as it bears upon this issue. The first regulatory authority for stationary sources given to the Federal government (other than the abatement-conference-hearing procedure) was contained in the 1967 Act. Pursuant to the provisions of that Act, the Secretary, HEW, was to designate air quality control regions. The designation, together with the issuance by the Federal government of air quality criteria and control techniques for specific pollutants, triggered State action to adopt both ambient air quality standards and plans to implement such standards. If a State either failed to take this action, or if State action was deemed inadequate by the Secretary, the Federal government was empowered to promulgate such standards and/or plans. The law provided that the ambient air quality standards be set by the States or by the Secretary at levels protective of public health and welfare. Although States were free to adopt more restrictive standards, the Federal government was without authority to adopt or to require emission controls more stringent than those needed to meet the ambient air quality standards. The Senate Report on the 1967 Act (No. 403, p. 4) in discussing the designation of regions, contained the following language: "When the air quality of any region deteriorates below the level required to protect the public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards ..." Although the Secretary was not precluded from designating regions prior to the time ambient air quality standards were exceeded,[3] the language indicates Congressional acknowledgment that the purposes of Federal regulation were to insure that air quality was maintained at levels which protected the public health and welfare. This concept has been carried forward in the 1970 amendments.

2. Under existing law, national ambient air quality standards are set by the Administrator. As in the earlier law they are to be set at levels which the criteria documents indicate are necessary to protect health and welfare. Again States may choose to adopt more stringent standards, but Federal responsibility and authority are clearly aimed towards forcing the achievement and attainment of the national standards.

---

[2] The possibility that it was the intention of Congress that growth, (and thus deterioration of air quality) should be prohibited only for some temporary period until existing sources install controls (perhaps 3 to 5 years) does not merit discussion.

[3] It is worth noting that the statement of purpose in section 101(b) discussed in paragraph 1 (supra) was a part of the 1967 Act.

3. Moreover, as a general matter the Act's approach is to condition authority on the demonstrated need for control. All standard-setting in the Act, including standards applicable to motor vehicles, hazardous emissions and fuel additives, require either findings or consideration of the need for standards to protect the public health and/or welfare. 4/ The concept of Federal control for reasons which cannot be reasonably related to the need for such control, is foreign to the theory of the Clean Air Act.

4. Some of the goals of a nondegradation policy may in fact be achieved under existing law. As noted above, the new source performance standards will achieve part of the desired purpose. Obviously, the speed with which such standards can be promulgated and the number of sources which are covered by the standards are important. Under section 110(a)(2)(B) of the Act, State plans must include those measures necessary to "insure attainment and maintenance..."[emphasis supplied] of the standards. Many of the legally supportable requirements which EPA will impose upon States, to insure that national ambient standards will be maintained, are identical to those measures which would constitute the implementation of a nondegradation policy, e.g., a permit system for all new sources, a means of regulating modifications of all existing sources, and the extent to which States must consider projected growth when setting emission standards.

5. Finally, it is important to note that although EPA cannot impose the requirement itself, States may and should be encouraged to do so. There are important reasons for States implementing this policy in addition to the "clean for clean's sake" approach. The "art" of establishing emission controls to achieve ambient air quality standards is not so exact than in most areas States can safely choose to apply something less than the best technology in their regulations. If air quality is allowed to deteriorate up to the standards, any revisions to plans due either to miscalucations as to the needed limitations, or adjustments to the national standards, will cause great difficulties to both the States and the affected industries. Moreover, allowing uncontrolled or poorly controlled sources to use up more of the air resource than is necessary will unnecessarily limit growth in States.

4/ Under section III, new source performance standards can only be promulgated for those sources which "...may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."

§ § § § § § §

TITLE: Applicability of New Source Performance Standards to Source Modifications

DATE: December 21, 1972

MEMORANDUM OF LAW

FACTS

Your memorandum of December 7, 1972, and our earlier telephone conversation have raised the issue of the applicability of the new source performance standards to modifications of existing affected facilities. You have suggested two possible interpretations of the Act:

> "(a) Total emissions (existing plus the increase) must be controlled to the levels specified by NSPS. This interpretation follows from the definition of a new source, which includes modified existing sources, and the stipulation that all new sources must meet NSPS.
>
> (b) Only the emission increase is subject to the NSPS. This interpretation follows from the argument that if the new capacity were built at a second location, the existing facility would not be subject to the NSPS. Therefore, it is inconsistent to apply the standards to the existing plant just because the new capacity is achieved at the same location."

Your memorandum also raises the issue of whether the language "increases the amount of any air pollutant emitted" in §111 should be interpreted as having some meaning other than an increase in mass emissions over some time period.

QUESTION #1

When an existing "affected facility" is altered so as to bring it within the definition of a "modification" in §111 of the Clean Air Act, is only the resulting increase in emissions (of the specified pollutant) subject to the relevant new source performance standard or are all emissions (of the specified pollutant) from the modified source subject to the standard?

ANSWER #1

Only the emissions resulting from the modification of the "affected facility" may be subjected to the new source performance standard.

QUESTION #2

What is the proper interpretation of the requirement in §111(a)(4) that a change "increases the amount of any air pollutant emitted"?

ANSWER #2

While there may be other methods of calculating the increase referred to, the determination of an increase in terms of additional mass emissions of a prescribed pollutant over some time period is consistent with the language of the section.

DISCUSSION

1. Section 111 of the Act provides that new source performance standards may be prescribed for any "new source" which includes "grass roots" facilities and major modifications of existing sources. The term "modification" is defined in §111(a)(4) as follows:

> The term modification means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. 1/

2. We do not believe that §111 can be interpreted so as to require the application of new source technology to existing facilities. The clear purpose of §111 is to apply newly developed technology to "grass roots" sources, which allows planning for the incorporation of such controls at the earliest stages of planning for the facility. However, in the case of a major modification, the incorporation of this "best demonstrated new source control technology" logically applies only to the new aspect of the facility, the modification itself, and not to the existing aspects. 2/ To the extent that a standard applicable to a modified source in effect requires the application of new source technology to the existing source, it is inconsistent with §111.

3. It is questionable whether the current new source performance standard regulations have adequate provisions to deal with the applicability of the standards to modified sources. For example, it does not appear that existing sources contemplating major modifications which would bring them within §111 must perform any sort of emissions test or emissions calculation to provide a baseline for purposes of determining the increase in pollutant emissions which would be subject to the standard. Given the difficulties involved in calculating just what portion of emissions from the modified facility must meet the standard, it may be that the regulations will have to place the burden on the owner or operator to provide baseline data (measured or calculated) or be subject to the standard with respect to all emissions of the specified pollutant from the modified source.

1/ The pollutant referred to must be considered to be only those to which the relevant new source performance standard applies.

2/ In some cases, the Agency may not reasonably be able to apply best demonstrated new source control technology to a modification. However, section 111(b)(2) provides flexibility to prescribe "best demonstrated modified source control technology" for modified source which qualify as "new sources" under the Act.

§ § § § § § §

TITLE: Resumption of Operations by Sources

DATE: February 14, 1973

MEMORANDUM OF LAW

FACTS

Your memorandum of February 2, 1973, briefly discusses the issue of the reopening of existing plants which have been closed for a period of time. Some have closed because of lack of demand for their products, others operate on a seasonal basis. You have inquired regarding the applicability of new source performance standards to these sources.

QUESTION

May a source which was in existence prior to the proposal date of a new source performance standard (applicable to that class of sources) be subjected to the standard when it resumes operations following the proposals?

ANSWER

No, the source would not be a "new source" within the meaning of §111(a)(2) of the Clean Air Act.

DISCUSSION

The sources which your memorandum describes are "existing sources", not "new sources" which may be regulated under §111. The section defines "new source" as follows:

> [A]ny stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard or performance under this section which will be applicable to such source.

Under the facts given, it is apparent that no "construction" activity is involved, since the source owner or operator merely takes those steps necessary to return a plant to its former operating condition and we do not think this could legitimately be characterized as "fabrication, erection, or installation of an affected facility".*/ In addition, no modification within the meaning of the section is involved, since it appears that neither the source's physical structure nor its method of operation is changed from its condition under previous operations.

---

*/ Which is the definition of "construction" under EPA regulation 40 CFR 60.2(g).

§ § § § § § §

TITLE: New Source Performance Standards for Asphalt Batch Plants

DATE: January 24, 1972

FACTS

James Berry and Robert Ajax of BSSPC have each had a telephone conversation with me regarding the development of new source performance standards for asphalt batch plants under §111 of the Act. They have described these plants as being composed of a number of apparatuses which are linked together as a working unit used in highway construction. The plants are typically situated in one location for several months at a time, then disassembled, moved to a new location, and reassembled. Over a period of years, one plant may operate in different air quality control regions and States.

QUESTION #1

Is an asphalt batch plant a stationary source within the meaning of §111 of the Clean Air Act?

ANSWER #1

Yes. Asphalt batch plants are semi-permanent sources which may be regulated under §111 as stationary sources.

QUESTION #2

Would the reassembly of the components of an asphalt batch plant which has previously been in operation make it a new source subject to §111 of the Clean Air Act and regulations in 40 CFR Part 60?

ANSWER #2

No. The plants as a whole would not be subject. However, where the reassembly involves the addition of an affected facility, the construction or modification of which was commenced after the effective date of a new source performance standard applicable to such facility, that new facility would be subject to the standard.

DISCUSSION

1. In a February 8, 1971 memorandum to Irwin Auerbach of OAP, I concluded that performance standards under §111 of the Act may be applied to semi-permanent sources "which are only incidentally removable rather than having mobility as an integral aspect". Asphalt batch plants and their component facilities clearly fall within this description. The fact that such plants are fairly large operations consisting of a number of apparatuses, and must be completely disassembled in order to be moved, distinguishes them from sources which have ready mobility as a principal characteristic.

2. Section 111(a)(2) defines a new source as "any stationary source, the construction or modification of which is commenced after ... [proposal] of regulations prescribing a standard of performance...which will be applicable to

such source". EPA regulations define "construction" as the "fabrication, erection, or installation of an affected facility" (§60.2(g)). This definition could be read to cover the reassembly of a previously-operated asphalt batch plant. However, it is clear from the legislative history that Congress did not intend such an application of §111. What was intended was the application of new control technology to sources created for the first time, so that emissions controls could be included in the planning and design stages. In short, the word "initial" must be read into §60.2(g) as modifying "fabrication, erection, or installation".

3. Probably a more important consideration to the case at hand is the applicability of the performance standards. Under the regulations, the standards apply to each "affected facility", which may be identified as a complete plant (e.g., a nitric acid production unit) or as a distinct apparatus within a plant (e.g., the kiln in a portland cement plant). From the facts before us, it appears that performance standards for asphalt batch plants would probably apply to the various component apparatuses. Accordingly, the applicability of standards would be determined on the basis of the "construction" (see definition in paragraph 2) of each affected facility rather than the entire plant. It seems likely that the construction of an affected facility for use in an asphalt batch plant would be only incidentally related to the reassembly of the plant.

§ § § § § § §

TITLE: Applicability of New Source Standards to Asphalt Plants

DATE: October 5, 1973

FACTS

In a recent conversation, you asked me to address the question of applying new source performance standards to an asphalt concrete plant as a consequence of the plant's having changed ownership.

QUESTION

Is a change of ownership of a source, without more, basis for subjecting the source of new source to new source performance standards under §111 of the Clean Air Act?

ANSWER

No. Mere change of ownership does not change the character of an existing source so as to constitute it a "new source" within the meaning of §111(a)(2).

DISCUSSION

The applicability of §111 standards to source depends upon whether they are new. Section 111(a)(2) defines a "new source" to be:

> "...Any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if

> earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source."

"Modification" is defined to mean a change in the physical plant or operational method which causes increased emissions. When the ownership of a plant is transferred, there is no physical change, nor could the mere fact of different management or personnel operating the plant be fairly characterized as a change method of operation.

Section 111 is concerned with the creation of new pollution sources, whether from "grass-roots" or enlarged plants or from significant operating changes, and the application of the best available control to such sources. Transfer of ownership does not change the emission characteristics of an existing plant.

§ § § § § § §

TITLE: Authority to Proscribe Processes

DATE: September 28, 1973

MEMORANDUM OF LAW

FACTS

Group II A new source performance standards under development by OAQPS for copper smelters group all types of furnaces together as "affected facilities". Application of the proposed SO standard to the reverberatory furnace will have the effect of banning its future use, it is agreed by OAQPS and the smelting industry, because the cost of compliance is prohibitive. Apparently, no effective means of control exists for reverberatory furnaces, while other types of furnace processes are controllable.

The background document for the standard addresses in some detail the available alternatives to the reverberatory furnace, and the costs associated with these alternatives. Smelting industry technical representatives have challenged the conclusions therein, and one lawyer for a smelting concern has submitted a letter concluding that §111 of the Act does not authorize EPA to effectively ban a process by setting a standard which it cannot meet.

QUESTION

Is EPA authorized under §111 of the Clean Air Act to promulgate new source performance standards for a class of sources which would have the effect of limiting the types of processes which can be used to conduct the activity in which the sources are engaged?

ANSWER

Yes. In general, EPA is authorized to promulgate one standard applicable to all processes used by that class of sources, in order that the standard may reflect the best system of emission reduction for that class. However, where the application of a standard to a given process would effectively ban the process a separate standard must be prescribed for it unless some other process(es) is available to perform the function at reasonable cost.

DISCUSSION

In prescribing new source performance standards the Administrator is frequently faced with identifying one control system or technique as being more effective than another for a given process. This determination is dictated by §111(a)(1), which states:

> "The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

In the case of some classes of sources, the different processes utilized in the production activity in which the source is engaged figure importantly in the emissions levels of the source and/or the technology which may be employed to control the emissions. For this reason, we think the "best system of emission reduction" language of §111(a)(1) should not be read so as to refer only to emission control hardware. It is clear that adherence to existing process utilization could serve to undermine the purpose of §111 to force the technology toward better control. As stated in the Senate Committee Report:

> "'Standards of performance', a term which has not previously appeared in the Clean Air Act refers to the degree of emission control which can be achieved through process changes, operation changes, direct emission control, or other methods." (p. 17)

Thus, if some processes are amenable to control while others are not, the singling out of the less controllable process for application of less stringent standards may well be subject to successful challenge as ignoring the mandate to impose standards which require the best system of emission reduction.

In determining whether different processes constitute a basis for setting different standards, the Agency first has the responsibility to determine whether processes are functionally interchangeable. Factors such as whether the least polluting process can be used in various locations or with various raw materials or under other conditions must be considered.

The second critical consideration for the Agency involves the costs of achieving the reduction called for by a standard applicable to all processes used in a source category. Where a single standard would ban a process which is much less expensive than the permitted process, the economic impact of the single standard must be determined to be reasonable or separate standards must be set. The basic approach is that of identifying economically viable alternatives to the process which is potentially to be prohibited. This does not mean that the cost of the alternatives can be no more onerous than those which would be associated with controlling the process under a less stringent standard.

Of critical importance in the promulgation of any standards of the type discussed here is a well reasoned, well documented discussion in the background document and/or the preamble to the regulations. This discussion should include the basic legal and policy rationale, the availability of alternative processes, the costs of alternative processes, and any particular problems identified in the Agency's examination of those issues. In this connection, the U.S. Court of Appeal's opinion in *Portland Cement Association* v. Ruckelshaus, 5 ERC 1593 (1973), is worth noting:

> We are not here considering a regulation that was issued in the contemplation that all new cement plants will be dry-process, and controlled by baghouses on the theory that this is the 'best system' of emission control. *Possibly such an approach would be feasible, but in any event it would require underlying reasons by EPA, to terminate the process...* identified as major now and in future production. (emphasis added) (Slip Op. at 41)
>
> As appears from our examination of technological feasibility, in Part IV of this opinion, a substantial question arises as to whether either wet process plants, or any process using electrostatic precipitators, will be able to achieve mandated pollution control. . . . As to exclusion of electrostatic precipitators, the record shows that they are a cheaper technology than fabric filters. Since remand is required for other reasons, as appear from Part IV, we confine our analysis at this juncture to a declaration that on remand the Administrator should consider, as a matter of economic costs, contentions and presentations submitting that the standard as adopted unduly submitting that the standard as adopted unduly precludes supply of cement, including whether it is unduly preclusive as to certain qualities, areas, or low-cost supplies. (Slip Op. at 23024.)

Coming to the specific issue which is now before the Agency, the application of a sulfur dioxide emission limitation to reverberatory furnace in copper smelters, the principles enunciated above necessitate a thorough examination of the costs associated with the available substitutes for reverberatory furnaces, especially in that area of their utilization where the availability of alternatives from a functional standpoint is in dispute. Our conclusion is that the background documents reflect sufficient consideration to proceed to proposal. Informational gaps that are identified now or are pointed out in comments will hopefully be closed in the final preamble or background statement.

§ § § § § § §

TITLE: Delegation of Authority

DATE: November 9, 1972

MEMORANDUM OF LAW

FACTS

The division of Stationary Source Enforcement is presently preparing guidelines for the delegation of authority to implement and enforce new source performance standards which is provided for in §111(c). Presently, all authority with regard to new source performance standards resides with EPA. Some States have requested delegation of this authority. At the present time, it is not clear exactly what form the delegation will take, the exact scope of authority which can or must be delegated, or the effect of such delegation on enforcement of the standards by the States.

QUESTION # 1

May the delegation make the new source performance standards "State" standards which can be enforced as State regulations?

ANSWER #1

Since the standards are authorized by the Federal Clean Air Act and promulgated by the Federal Environmental Protection Agency, they cannot be considered "State" standards and must be enforced as Federal standards by the States.

QUESTION #2

May State agencies be delegated the authority to enforce Federal standards?

ANSWER #2

State officials may be authorized by the Federal Government to implement and enforce Federal law. While there are arguments on both sides of the question of whether a State official may enforce Federal law where there is a State policy or statute prohibiting him from acting in such a manner, the more modern view should permit a State official to carry out delegated authority under the Clean Air Act regardless of State law given the cooperative Federal-State concept of the Clean Air Act. It is unlikely that there will be any State restrictions arguably precluding State officials from implementing and enforcing the new source performance standards.

QUESTION #3

May the scope of authority delegated to a State be less than the authority available to the Administrator?

ANSWER #3

Since the Clean Air Act provides that a delegation may be made only if the State has adequate procedures and it is a delegation of "any" authority which the Administrator has under the Act, the Administrator is not required to delegate all of his authority but can restrict it to the extent he deems appropriate.

DISCUSSION

1. Section 111 of the Clean Air Act, as amended, provides for the promulgation of regulations setting forth Federal standards of performance for new stationary sources within certain categories. Enforcement of these standards by the Administrator is provided for in §113(a)(3) and §§113(b)(3). Section 111(c) states that:

> (c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).
>
> (2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

2. The full impact of this section depends upon an analysis of both the Clean Air Act and some of the basic principles behind our Federal system of government. At the present time, the new source performance standards are solely the responsibility of the Federal government. Even though a State may have standards which apply to new sources and are more or less stringent than the §111 Federal standards, the latter constitute Federal law and must be complied with by a source regardless of any such State standards which it must also meet. A State could, of course, promulgate standards exactly as stringent as the Federal and implement and enforce them pursuant to its own procedures. A State may forego the opportunity to establish similar standards and, through a delegation of authority under §111, assume responsibility for controlling a particular group of pollution sources. The delegation provided in §111(c) reflects the overall emphasis of the Clean Air Act on developing and encouraging State responsibility for improving the quality of the nation's air.

3. The most fundamental question raised by §111(c) is the authority of the Congress of the United States to authorize State officials to implement and enforce Federal law, whether that law be established by statute or by regulation. It has been settled for many years that the Federal Government may authorize State officials to perform a particular duty. Kentucky v. Dennison, 65 U.S. 66, 107-08 (1860). Therefore, Congress clearly can authorize a

State agency to implement and enforce Federal standards. 1/ While there is some case law to the effect that the Federal Government cannot compel a State agency to perform these duties, it will be assumed that this is not the situation here since the State must request the delegation and provide adequate procedures for implementing and enforcing the regulations. The only limitation which might affect the performance of a State official in carrying out the delegated authority is raised in some cases which hold that while a State agency or official may be authorized to carry out Federal law, he cannot do so if it conflicts with a State constitutional or legislative prohibition against such conduct. *E.g.*, *Dallemagne* v. *Moisan*, 197 U.S. 169 (1905). The present-day effect of such a limitation is not exactly clear. A significant United States Supreme Court case, *Testa* v. *Katt*, 330 U.S. 386 (1947), held that the State could not deny enforcement of claims arising out of a valid Federal law. The decision found the State policy to be subject to and superceded by the supremacy clause of the United States Constitution 2/ which holds that the Constitution and laws pursuant to it are the supreme laws of the land, and they are binding alike upon States, Courts and people, regardless of anything to the contrary in the constitution or laws of the State. 3/

4. There are other decisions, however, which provide support for the conclusion that Federal law may permit State officials to perform certain actions regardless of the dictates of State law. For example, in *Indiana* v. *Killigrew*, 117 F.2d 863 (7th Cir. 1941), a State court clerk was held to have authority to naturalize citizens as expressly authorized by Federal law even though there was no State statute permitting him to exercise such authority. The case of *Gates* v. *Council of the City of Huntington*, 93 F. Supp. 757 (S.D.W.Va. 1950) affirmatively supports the proposition that a State agent can act pursuant to Federal law regardless of his authority under State law. There, a Federal statute authorized any city council to extend the provisions of the Rent Control Act merely by passing a resolution that there remained a need for such rent controls within the community. The city charter did not authorize the city council to make any such resolution and such action was therefore outside the express power of the council. The Court found that the council had the authority to make such a determination since it was acting under Federal law, not under State law. The Court noted that when Congress acts on a matter within its constitutional authority, such action becomes a part of the State policy in the same manner as if the State legislature itself had enacted that kind of law and that neither the silence of local law nor any policy or rule

---

1/ Whether this is done by express authorization by Congress or through a determination by the Administrator should be irrelevant. Congress has expressed its desire to have States assume responsibility and has merely left the actual authorization to the Administrator to provide flexibility. This is a permissible delegation of Congressional authority.

2/ U. S. Constitution, Article VI, §2.

3/ This case did, however, deal directly with the jurisdiction of Courts, not with the authority of State agencies, and there was some suggestion in the opinion that the State courts did provide jurisdiction for "similar causes arising under State law".

to the contrary could serve to defeat the will of Congress. This clearly supports the position that a State agency could act pursuant to any delegated federal authority to implement and enforce Federal new source performance standards irrespective of conflicts with State laws, regulations or policies.

5. Further support can be found in cases arising out of the Federal Power Act. That Act authorized delegation of the Federal emminent domain power to any Federal licensee under the Act. In several instances, this licensee was a local municipality. The courts upheld the exercise of this Federally delegated power despite the lack of any express State authority to exercise it. 4/ In Chapman v. Douglas Co., 367 F.2d 163 (9th Cir. 1966), the Court noted that "the substance of the delegated Federal power, however, may not be diminished by State law." 5/ Thus, it would appear that there is precedent and authority for a provision such as the delegation of authority to implement and enforce the new source performance standards. Admittedly, Congress cannot legislate outside the realm of its authority as specified in the enumerated powers delegated to it by the States. But that is not the situation here where Congress is legislating to protect the public health through the Commerce clause. The only question is whether the State, since it retains concurrent authority over control of air pollution within its jurisdiction, can limit the manner in which the Federal government exercises its authority when such exercise involves the use of State agents. Based on the above cited cases, it is our opinion that such a delegation may be made and carried out despite any possible limitations which exist in State law. We would assume, however, that for the most part there will be no restrictions in the State law which will impede the State agency from implementing and enforcing the standards of performance.

6. Since Congress had the authority to pass §111(c), the only question remaining is the manner and scope of the delegation. The section provides for the Administrator to delegate as much authority as he has to the States, but it does not require him to do so. First, he must review the State procedures to determine if they are adequate. A State may elect not to carry out all the necessary aspects of implementation and enforcement or to implement only certain standards. Furthermore, a State may utilize its own available State authority to carry out certain aspects of implementing the standards. The provision therefore necessarily contemplates that the Administrator may grant as much or as little of his authority as he deems appropriate and necessary to enable the State to carry out any or all §111 standards.

7. There is great flexibility provided the Administrator in determining how the States must show that their procedures are adequate. For example, he can require them to illustrate exactly how they will compel sources to comply with the standards, how the sources will be inspected and supervised to determine their compliance, and how enforcement will actually be undertaken. If

---

4/ See Washington Department of Game v. FPC, 207 F. 2d 391 (9th Cir.).

5/ 367 F. 2d at 167.

the procedures do not provide for implementation and enforcement of the standards as desired by the Administrator, he may clearly find them inadequate to that extent and refuse the delegation. The Administrator can determine what is "adequate" so the procedural requirements presented to the States can establish any restrictions which DSSE deems necessary to insure that the States will carry out the delegated authority in a manner consistent with EPA policy.

8. One specific problem lies in the realm of enforcement where, in order to prevent possible undesirable precedent for cases filed directly by EPA, it is desired that the States not enforce the regulations in Federal court. Of course, enforcement of Federal regulations such as these is available to the Administrator either in State or Federal court. 6/ Since the Administrator can delegate any authority he has under the Act, it would appear permissible for him to delegate to the State agencies only the authority to seek enforcement pursuant to State law and in State courts. 7/ This could also be based on his determination of what are adequate procedures for carrying out this section. It would provide the States with full enforcement in courts they are familiar with while eliminating the problem of State involvement in Federal courts.

9. It should be noted that §111(c) provides for delegation of "authority" which the Administrator has. Section 113 provides criminal penalties for violations of §111. This criminal penalty is not part of the authority of the Administrator but is a statutory penalty; as such, it is not something which can be delegated. The State agencies will have to seek relief from the remedies generally available to them under State law.

10. It is, therefore, our interpretation that the Administrator may delegate his §111 authority to the States and that such delegation may be limited to the extent the Administrator deems appropriate, including restrictions on the forum for enforcement actions. The States will be enforcing Federal regulations but pursuant to State procedures. While we believe such a delegation is justified, some State courts may find that the State agents cannot implement Federal standards where State law precludes it, as discussed above. In such a case, the delegation would have to be withdrawn.

6/ See Testa v. Katt, supra. Even if a court were to find that Testa does not require a State court to hear a Federal cause of action where State policy prohibits such jurisdiction, the situation should not occur with regard to these regulations since all States provide jurisdiction for enforcement of regulations protecting health through prohibition of air pollution. Since a State court would entertain a similar State cause of action, it is in no position to refuse to accept a Federal cause of action. See also Claflin v. Houseman, 93 U.S. 130 (1876).

7/ §113(b) provides jurisdiction for the Administrator to enforce a violation of §111(c) in the United States District Court. This being one part of his authority under the Act to implement and enforce §111 standards, he can refuse to extend it to the States.

TITLE: Standards Upon Which State Emission Standards Must be Based

DATE: May 26, 1971

QUESTION

This is in response to your memorandum of May 7, 1971, which raises the question of whether section 111(d) of the Clean Air Act requires the States to adopt emission standards applicable to existing sources which are adequate to protect public health and welfare.

ANSWER

Section 111(d) of the Clean Air Act requires the Administrator of EPA to promulgate regulations which mandate States to adopt emission standards which are necessary and sufficient to protect public health and welfare. In no event, however, may the Administrator require the imposition of emission standards which are more stringent than the new source standards of performance promulgated under section 111(b) of the Act.

DISCUSSION

1. Section 111(d)(1) of the Clean Air Act provides,

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

2. The foregoing provision does not state the basis on which such "emission standards" are supposed to be established. Likewise, neither the Conference Report on H.R. 17255 (which ultimately became P.L. 91-604), nor the floor debates on the conference bill specify the appropriate basis for establishing such standards. The only legislative history is inconclusive. 1/ In light of this uncertainty, we regard three alternative interpretations of section 111(d) of the Clean Air Act as plausible.

1/ The predecessor of section 111(d) of the Clean Air Act was section 114 of the Senate-passed bill, S. 4358. Section 114(c)(1) provided that national emission standards for "selected" air pollutants "shall be designed to insure that emissions of such pollution agent or combination of agents from any such stationary source shall not endager public health." Section 111(d) of the Clean Air Act represents a substantial modification of section 114 of the Senate-passed bill. Without explanation or inclusion of another criterion, the conferees eliminated protection of public health as the stated basis for the emission standards.

3. First, section 111(d) may be read as requiring the establishment of emission standards which reflect the emission reductions attainable through use of the best available emission reduction systems applicable to existing sources (i.e., "best available retrofit"). Second, as your memorandum of May 7 suggests, section 111(d) may be read as requiring that emission standards reflect such reductions, unless the State "could show that public health and welfare would not be endangered by application of less stringent emission standards". In such cases, emission standards would be based upon the reductions necessary to protect the public health or welfare.

4. However, we believe a third reading to be the most persuasive. We believe that Congress intended the section 111(d) emission standards to protect the public health and welfare. 2/ However, in many instances the health and welfare effects of the pollutants to which section 111(d) emission standards may apply have not been adequately determined. This is so, at least partly, because such pollutants "are not emitted in such quantities or are not of such character as to be widely present or readily detectable on a continuing basis with available technology in the ambient air." 3/ In light of this lack of knowledge Congress apparently established a rebuttable presumption that installation of the best available retrofit would be both necessary and sufficient to protect

---

2/ It is true that section 114(c)(1) of S. 4358 provided for national emission standards for "selected" air pollutants "designed to insure that emissions of such pollution agent of combination of agents from any such stationary shall not endanger public health." It is also true that section 111(d) of the Act did not include any such provision. Normally, such a deletion would be considered evidence of congressional intent to base 111(d) emission standards on some criterion other than protection of the public health. However, by 1) specifying State-by-State emission standards, 2) failing to specify what criterion should be used, if not protection of public health and welfare, and 3) tying 111(d) standards to 111(b) new source performance standards which are aimed at sources which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare", Congress appears to have adopted the approach we set forth herein.

3/ Senate Report on S. 4358 (No. 91-1196), September 17, 1970, p. 18.

public health and welfare. 4/ Thus, Congress intended that the Administrator's regulations under section 111(d) would require States to establish emission standards based on best available technology applicable to an existing source (i.e., "best available retrofit"), unless the Administrator determined that such emission standards were either unnecessary or insufficient to protect the public health and welfare.

5. If the Administrator determines that the public health or welfare are adequately protected by the establishment of emission standards which are less stringent than those based on best available retrofit, emission standards may be set at such less stringent level. In such a case, industry and consumers should not be put to the extra expense necessarily involved in more stringent control of emissions.

6. If, on the other hand, the Administrator determines that emission standards on the best available retrofit are not sufficiently stringent to protect public health and welfare, 5/ emission standards must be established at a more stringent level which is sufficient to assure such protection. 6/

4/ The location of section 111(d) in section 111 rather than as a separate section, as in the Senate bill, the close relationship of section 111(d) emission standards to standards or performance under 111(b), and the identity of sources to which they apply indicate congressional intent to establish such a presumption requiring the application of the best available technology applicable to existing sources.

That the presumption was intended to be rebuttable is evident from the fact, which you point out, that Congress did not intend "to have nationally uniform emission standards applied to existing sources under section 111(d)." Not only does section 111(d) provide for the establishment of emission standards on a State-by-State basis, but Congress rejected section 14 of the Senate-passed bill, the predecessor of section 111(d), which provided for the establishment of national emission standards applicable to existing sources.

5/ Whether emission standards based on the best available retrofit will be adequate, more than adequate, or less than adequate to protect public welfare depends to some extent upon local factors, such as the concentration of sources of a certain type of pollutant and the proximity of such source(s) to populated areas. To permit consideration of factors such as these, Congress rejected the Senate bill's national emission standards approach.

6/ As your memorandum points out, the standards must "as a minimum, [be] adequate for protection of public health or welfare." It may be argued that it is unreasonable to read section 111(d) to require the application of emission standards to existing sources which are more stringent than standards based upon best available retrofit. We do not find this argument persuasive. The Administrator is implicitly authorized under section 111(d) to establish deadlines for compliance with the emission standards. Reasonable time must be allowed to permit installation of the requisite control (continued on next page)

7. In no event, however, may the Administrator require any State to adopt an emission standard applicable to an existing source under section 111(d), which is more stringent than the comparable new source performance standard applicable to such a new source. 7/ Since section 111(b) makes no provision for prohibiting the operation of a new source which meets the applicable standards of performance, it is inconceivable that Congress could have intended to permit the Administrator to require an existing source to meet a standard which cannot be achieved, even through a application of the best available technology applicable to a new source.

8. In sum, we agree with your memorandum of May 7, 1971, with the additional provisions we have suggested in paragraphs six and seven of this memorandum.

9. As we have previously advised you orally, several other problems remain to be resolved prior to promulgation of the regulations under section 111(d). Among the issues which remain to be clarified are the timing for compliance with the State emission standards and the form that the regulations of the Administrator will take. We assume these and other relevant concerns are currently under consideration by your office.

§ § § § § § §

TITLE: Federal Performance and Hazardous Emission Standards -- State Enforcement

DATE: February 8, 1971

1. A question has arisen with regard to the responsibility of States to enforce Federal new source performance standards and Federal hazardous emission standards. A draft of the guidelines document to be issued to States in connection with implementation plans contains what appears to be a request that each State submit a statement of policy that it will adopt procedures needed to enforce Federal emission standards when such standards are promulgated. In another context, APCO has raised the issue in a January 22, 1971, memorandum to this office, asking whether, as a condition of receiving grant assistance under §105 of the Act, States may be required to enforce such standards.

(Footnote #6 continued from previous page)
equipment. If emission standards adequate to protect the public health and welfare necessitate the installation of the best available new source technology, then additional time may be allowed for compliance (i.e., replacement of the existing sources with new sources). If, at the end of the period allowed for compliance, any plant continues to emit in excess of the emission standard to the detriment of the public health or welfare, it would be closed.

7/ No state is precluded from applying to existing sources a standard more stringent than the comparable new source performance standard. See section 116 of the Act. However, States may not be required to adopt such a more stringent standard.

2. Both §111 of the Clean Air Act, which authorizes Federal performance standards applicable to new sources, and §112, which authorizes Federal standards for hazardous pollutants, clearly provide that the development, promulgation and implementation of the standards are Federal responsibilities. Both sections however, contain a procedure by which States may undertake the implementation and enforcement of the respective standards. The pertinent subsections (111(c)(1)) and 112(d)(1)) are almost identical in language, i.e., "Each State may develop and submit to the Administrator a procedure for implementing and enforcing..." the standards. [Emphasis supplied]. Under both sections, "If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under the Act to implement and enforce such standards...." Finally each section provides that even after such a delegation is made, the Administrator retains concurrent enforcement authority.

3. There is no doubt that under these provisions the implementation of Federal standards is primarily the responsibility of the Federal government. The quoted sections are permissive in nature and cannot be construed to place any legal obligation on the States.

4. Since the law itself does not require States to perform this function, in our opinion APCO cannot, either as part of its requirements for State implementation plans or as a condition of grant support to States, impose this requirement.

5. This conclusion is not inconsistent with advice previously given by this office to the effect that APCO has a great deal of latitude to imposing requirements on States in connection with both grant support and implementation plans. In both of these areas the law places the responsibility with the State, with clear authority in the Federal government to oversee States, and to act if States fail. This is quite different from the case of the national performance and hazardous standards. Here, as is appropriate in the case of national standards, Congress selected EPA as the responsible entity. States were merely given the option, in appropriate circumstances, to undertake, concurrently with the Federal government, responsibility for a portion of the implementation of the standards. There is no justification in the law or the legislative history for altering this framework by requiring States to undertake this responsibility.

6. This does not mean of course, that States should not be encouraged and assisted in developing a program under which they can implement Federal standards. In this connection it would be helpful to States if APCO developed and made available to States the criteria by which the adequacy of their procedures will be judged. We are available to assist in the development of the criteria.

SECTION 112 OF THE CLEAN AIR ACT -- NATIONAL EMISSION STANDARDS FOR HAZARDOUS POLLUTANTS

TITLE: EPA's Authority to Establish an Ambient Concentration Standard

DATE: August 13, 1974

Mr. Scott H. Lang, Attorney
Environmental Defense Fund
1525 18th Street, N. W.
Washington, D. C. 20036

Dear Scott:

You asked me to advise you what the Agency's position is with respect to our authority to establish an ambient concentration standard under Section 112 of the Clean Air Act, "National Emission Standards for Hazardous Air Pollutants".

As I understand your position, it is that EPA should establish a "safe" ambient level for a hazardous air pollutant and then set, on a case by case basis, emission standards as are necessary to ensure that the safe level is not exceeded in any situation. You said that you felt that this would be a preferable approach to establishing emission standards applicable across the country which in some cases would be unnecessarily strict and in other cases might be inadequate to protect the public health.

We share your concern that emission standards established on the basis of public health, as opposed to considerations of control technology and cost, could be over or under protective in particular situations. For example, a standard established to protect the public health from a large number of overlapping sources of the same pollutant in a large population area would likely be unnecessarily restrictive applied to a single source located in an isolated location. Conversely, an emission standard established on the basis of protecting the public health from an ordinary concentration of sources and ordinary meteorological conditions might result in a smaller margin of safety in unusual situations. Nevertheless, we believe that Congress quite clearly intended that EPA would in fact set national emission standards for hazardous air pollutants under §112 rather than national ambient standards that would result in varying emission standards on a case by case basis. Congress is quite clearly aware of the distinction between ambient standards and emission standards. Congress provided for national ambient standards in Section 109 of the Clean Air Act and emission standards in Sections 111 and 112 of the Act. Thus, in our opinion Section 112 cannot be construed to permit ambient standards. (The ambient concentration limit in §61.32(b) of the regulation is in reality an emission standard since it applies only to a very few isolated point sources where the ambient limit is effectively a means of measuring the facility's emissions.)

There are also policy reasons for not construing §112 to require or permit ambient standards. The difference between an ambient level and an emission level is enormously important in terms of implementation. Implementing an "emission level" requires only that techniques of measurement and enforcement be developed. The amount of discretion required for such decisions is comparatively small. On the other hand, implementation of an ambient level requires that decisions be made as to which sources shall be allowed what emission levels of pollutants in order to maintain the ambient levels. This decision involves value judgments. In §110 of the Clean Air Act Congress provided elaborate procedures for translating ambient standards to emission standards. These procedures, while insuring fairness, require enormous expenditures of time and manpower at both the State and Federal Government levels. Accordingly, national ambient air quality standards can be established only for those pollutants "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." Section 108(a)(1)(B).

Congress envisioned a different type of regulatory process for pollutants which are hazardous but do not result from numerous or diverse sources. Section 112 of the Clean Air Act provides for regulation of such sources. It would be very cumbersome to control such pollutants through the State implementation plan process. Congress ordered the Administrator of EPA to directly establish emission standards for such sources. If Congress had intended to authorize ambient standards under §112, it would so provide, or at least not specifically require "emission standards." Furthermore, Congress would presumably have prescribed some method to insure that the necessary ad hoc determinations required to set emission limits on individual sources in order to meet the ambient standards were fairly conducted. Adjudicatory hearings would probably be required. Some guidance probably would have been given concerning how judgments were to be made concerning which emissions would be permitted and which eliminated. Would achievability and cost or the social value of the various emitting industries be determinative? Would existing sources be preferred over new sources?

In most cases, because the sources of hazardous air pollutants are not "numerous or diverse," there should be no overlap problem. Standards are set for different sources that ensure that ambient levels are not reached which threaten public health. In establishing emission standards under Section 112, EPA attempted to take into account those situations where several sources of the same pollutant may be located in the same area. The "margin of safety" which EPA is required to include in §112 standards will necessarily vary from place to place, but in no cases will it be eliminated. If we found that it was eliminated, we would revise our standards accordingly. In this respect we note that both the ambient levels considered by EPA in developing its §112 standards and the actual emission standards established to avoid exceeding the ambient levels have margins of safety built in. Thus, even if the ambient guidelines are exceeded in a few specific situations, this does not mean that the margin of safety has been eliminated or that all sources in the country should be subjected to more stringent standards under §112.

In summary, we believe that Section 112 on its face makes it quite clear that the Administrator is to establish emission, not ambient, concentrations limits for hazardous air pollutants which satisfy the criteria of that section. Furthermore, we do not believe that it would be wise or appropriate for the Administrator under the authority of Section 112 to regulate emissions on a case by case basis.

You also asked whether EPA has authority to issue standards under §112 which would apply to any (i.e., undesignated) sources. Although the statute does not require that sources to which §112 standards would apply be specifically designated. I believe that it would be a violation of due process not to do so. Capture and analysis of air emissions usually is quite expensive. A Section 112 standard required to all (undesignated) sources would require every stationary source in the country to test its emissions for the pollutant involved or be in jeopardy of violating Section 112. This is an enormous, and in our opinion unjustified, burden to impose upon sources which neither EPA nor the source has any reason to believe is emitting the Section 112 pollutant. Furthermore, sources which didn't believe they were emitting the §112 pollutant might not be able to test, and thus learn whether they would be affected by the regulation, until after the comment period on the proposed regulation had expired. The problem is exacerbated by the fact that §112 only applies to pollutants for which there is no applicable ambient air quality standard and therefore is presumably emitted only by a few sources.

A further problem is that EPA believes that the environmental and economic impact of all its standards should be determined and disclosed to the public. It would be impossible to make this determination if we don't know what sources will eventually prove to be subject to our standards.

An additional problem with your suggested approach is that different sources may have different emission characteristics which require different standards to protect the public health. For example, some sources have emissions which are at low temperatures and close to the ground and thus have a considerably greater impact on ambient levels breathed by people than do other sources which have tall stacks and high temperature emissions. It would be unnecessary and, therefore unfair, to restrict the latter source to the same emission limits as the former source.

For these reasons, we believe that §112 standards should be made applicable only to designated sources. Whenever it appears that additional sources may emit the pollutant in question in unsafe amounts, we will immediately investigate the situation and propose and promulgate regulations as necessary to protect the public health.

While I regret I must disagree with you on both of these issues, I believe we share the same goal - construing EPA's authority to maximize the protection of the environment and the public health. Accordingly, I would be pleased to consider any arguments you may have in opposition to the above positions.

SECTION 113 OF THE CLEAN AIR ACT -- FEDERAL ENFORCEMENT

TITLE: Enforcement Orders

DATE: July 12, 1972

1. This memorandum confirms oral advice rendered to you over the past several months concerning the issuance of §113 orders to alleged violators of implementation plan requirements. In addition, as you requested, it responds to several points raised by the Legal Support Division (LSD) of the Offfice of Water Enforcement in a memorandum commenting on SSED's proposed guidelines for enforcement. 1/

2. We have previously advised you that the Clean Air Act does not require an opportunity for a formal or informal hearing of any type, other than the "opportunity to confer with the Administrator: required by §113(a)(4), before an order may be issued to take effect 2/ under §113. This advice is consistent with the statement in the LSD memorandum (p. 4) that the Act neither requires nor forbids providing an opportunity for a "quasi-judicial" hearing. In addition, we have advised you that neither the Administrative Procedure Act 3/ nor constitutional due process 4/ requires the Agency to provide an

---

1/ Memorandum to Director, Legal Support Division, from Carol A. Cowgill (subject: "Comments on Proposed Guidelines for Enforcement Actions Against Violations of Air Quality Implementation Plans"), June 29, 1972 [hereafter cited at "LSD memorandum"]

2/ For purposes of our analysis, we have assumed that the phrase "take effect" in §113(a)(4) refers to the time at which a §113 order becomes sufficiently "final" that civil or criminal proceedings may be commenced for its violation.

3/ It is well-established that the Administrative Procedure Act does not require formal hearings, either for adjudication or for rulemaking, where such hearings are not required by some other statute or by the Constitution. *E.g.,* Sisselman v. Smith, 432 F. 2d 750, 754 (3d Cir. 1970, and cases cited. As discussed in paragraphs 4 and 5 below, we believe due process does not require hearings at the administrative level in connection with the issuance of §113 orders.

As we discussed, §6(a) of the Administrative Procedure Act, codified in 5 U.S.C. §555(b) (1970), can be read as conferring a right to "appear" in connection with the issuance of §113 orders, both for the alleged violators and for interested persons. Assuming that this reading is correct, however, the provisions of §6(a), standing alone, do not purport to require formal hearings, particularly when compared with provisions intended to require hearings and related procedures. *E.g.,* 5 U.S.C §§553, 554, 556, 557 (1970).

opportunity for a formal administrative hearing before a §113 order may be issued or take effect. This advice appears to be consistent with the analysis presented in the LSD memorandum, which argues that formal hearings would be desirable for various reasons but, with one possible exception, 5/ does not argue that they are mandatory.

3. As you know, our previous advice was based on relatively extensive research, the results of which are reflected in a draft memorandum approximating 40 double-spaced pages in length. Although time has not permitted us to issue the memorandum in final form, its contents have been reviewed within this office and, we believe, reflect the present state of the law. On that basis, we reaffirm the advice previously rendered on the points mentioned above.

4. A brief summary of our views with respect to due process requirements may be useful for present purposes. We believe that a party to whom a §113 order has been issued is entitled to an opportunity to be heard on disputed matters before coercive sanctions may be imposed for a violation of the order. Due process does not necessarily require, however, that an opportunity to be heard be provided at the administrative level. It is ordinarily sufficient if a party affected by an opportunity to present all available defenses to court (for example, in civil or criminal enforcement proceedings) before coercive sanctions may be imposed.

5. A somewhat different question arises in the case of §113 orders, because violation of such an order is a separate ground for the imposition of criminal penalties. 7/ In such cases, the possibility of testing the order in proceedings

---

4/ *See* paragraphs 4 and 5, *infra*.

5/ *See* note 15, *infra*.

6/ *E.g.*, Rowan v. United States Post Office, 397 U.S. 728, 738-39 (1970), *and* cases cited. Where administrative action may have an immediate and drastic effect on the affected party, however, without serving an overriding governmental or public interest in summary action, due process may require an opportunity to be heard before the action is taken. *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 262-64 (1970), and cases cited. We believe such actions are distinguishable from the issuance of §113 orders; *e.g.*, in terms of the types of interests at stake and the consequences of the actions for the affected parties. *Id.* at 264. As to the rights of third parties affected by §113 orders, *see* generally Getty Oil Co. v. Ruckelshaus, __ F. Supp. ___, Civil No. 4366 (D. Del., May 10, 1972), slip op. at 17 n. __, 32-38.

7/ Although criminal penalties may be imposed if a violation continues more than 30 days after issuance of a §113 notice (except in the case of a violation of §114), the requirements with which a source must comply in such a case are pre-existing requirements established by approval or promulgation of the applicable implementation plan and subject to challenge under §307 at the time of approval or promulgation. With some reservations, we believe such cases fall within the general rule referred to above. *See, e.g.*, Rowan v. United States Post Office, *supra* note 6, at 738-39; Ewing v.

brought for its violation may be insufficient, standing alone, to satisfy due process. 8/ Assuming that this rule is still the law, 9/ however, recent decisions appear to establish that due process is satisfied in such cases by the opportunity to test the validity of an administrative order (a) in pre-enforcement review proceeedings or (b) in enforcement proceedings in which penalties are stayed pending review of the order. 10/ Even if this were not true in the case of §113 orders, the result would be about the same; *i.e.*, an injunction against enforcement of an order or imposition of penalties until the validity of the order had been tested in court. 11/ In either case, available defenses could be presented in court, and due process would not require an opportunity for hearing at the administrative level.

6. As noted above, the LSD memorandum argues that formal administrative hearings would be desirable for a variety of reasons. Although we would agree that most of the points raised in the memorandum suggest the desirability of formal hearings, we understand that they have been considered at some length in previous discussions of the question. In any event, we believe that some adverse practical consequences of providing such hearings deserve mention if the question is reopened at this time.

7. If the number of enforcement actions taken under §113 is large, as we expect it to be, it could severely strain the Agency's resources to provide

---

7/ Mytinger, 339 U.S. 594, 598-99 (1950). Where a §113 order is issued, however, the order may impose new requirements (*e.g.*, "milestones" to assure compliance) with which a source must comply or risk criminal penalties. In such cases, as indicated in the text, a somewhat different rule may apply.

8/ *E.g.*, Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); *Ex parte* Young, 209 U.S. 123, 147-48 (1908). *But see* note 9, *infra*. The rationale of the rule is that, if the validity of the order can be tested only by disobediance, the threat of criminal penalties can so deter a challenge that the opportunity to present available defenses has been effectively denied. *E.g.*, Oklahoma Operating Co. v. Love, *supra*, 252 U.S. at 336-37.

9/ The scope and vitality of the rather old decisions cited in note 8, *supra*, may be questioned in view of more recent decisions. *See, e.g.*, Reisman v. Caplin, 375 U.S. 440, 446-50 (1964). *See also* Clark v. Gabriel, 393 U.S. 256, 259 (1968).

10/ *E.g.*, Reisman v. Caplin, 375 U.S. 440, 446-50 (1964) (dictum); St. Regis Paper Co. v. United States, 386 ULSL 208, 225-27 (1961) (dictum); Genuine Parts Co. v. FTC, 445 F. 2d 1382, 1392-93 (5th Cir. 1971). *See also* Abbott Laboratories v. Gardner, 387 U.S. 136, 156 (1967), and companion cases; Getty Oil Co. v. Ruckelshaus, _____ F. Supp, _____, Civil No. 4366 (D. Del, May 10, 1972), slip op. at 37.

11/ Oklahoma Operating Co. v. Love, *supra* note 8, 252 U.S. at 337-38; *Ex parte* Young, *supra* note 8, 209 U.S. at 148, 165.

formal hearings whenever orders are issued. 12/ In many cases, the issuance of orders may bring about compliance without the necessity of further proceedings. In such cases, formal hearings would be an unnecessary burden. 13/ In other cases, where large amounts of money are at stake, or where alleged violators have an interest in delaying enforcement as long as possible, we doubt that many lawsuits would be forestalled by the device of providing hearings. In such cases, the Agency would face the burden of two formal proceedings rather than one. 14/

12/ It might be argued that the Agency should undertake enforcement actions only when it has the resources to conduct full hearings in each case. If so, we doubt that the Agency could fulfill its mandate under the Clean Air Act. We believe Congress intended the §113 order to provide a more expeditious means of enforcement than civil or criminal proceedings, and that it expected the Agency to exercise its various powers of enforcement to the maximum degree necessary to bring about rapid compliance with the implementation plans. See, e.g., Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 21 (1970). In this regard, it should be noted that attainment of the national standards within the times specified in the implementation plans, as mandated by Congress, depends on timely compliance with the requirements of the plans. In other words, if significant numbers of polluters are not forced to comply according to schedule, the intent of Congress will have been frustrated.

13/ It might be argued that the Agency need offer only an opportunity for hearing, in which case the number of hearings actually conducted might be substantially reduced. If an opportunity for hearing is provided, however, we believe many companies that would have complied with orders in the absence of hearings will be tempted to request such hearings on the ground that they have nothing to lose and, at the least, will gain time by going through the additional procedure.

14/ The LSD memorandum (p. 4) argues that judicial review of an order issued after a formal hearing would be limited to application of the substantial evidence test. If so, the burden of judicial review would be lessened to some extent. It should be noted, however, that there is some question whether the substantial evidence test would apply when, as here, hearings would be provided although not required by the Administrative Procedure Act or other pertinent statutes. See 5 U.S.C. §706(2) (E) (1970). As you know, our preliminary research on that question has disclosed conflicting authorities. Compare, e.g., Jordan v. United Insurance Co. of America, 289 F. 2d 778, 783 (D. C. Cir. 1961) (de novo trial proper), and cases cited, with U.S. Dep't 109-10 (1947) (de novo trial improper), and cases cited. See generally 4 K. Davis, Administrative Law Treatise §§29.01 et seq. (1958); F. Cooper, Administrative Agencies and the Courts 346-47 (1951). Accordingly, we cannot render a definitive opinion on the question without further research.

8. Probably the most important factor is that, for resourceful corporate counsel, the administrative hearings would provide a host of opportunities for delay, as well as an additional set of issues to raise in subsequent litigation; i.e., the adequacy and fairness of the hearing procedures, the propriety of rulings on evidence and similar matters. In view of the cumulative burdens and delays that could result, the inherent advantages of the enforcement order, as opposed to civil and criminal proceedings, would largely vanish.

9. You have asked that we comment on several additional points raised in the LSD memorandum. With respect to citizen participation in the process of issuing §113 orders (p. 5 of the memorandum), a partial answer is that citizens have many opportunities to partcipate in the development and enforcement of implementation plans, including the options of (a) intervening in State or Federal suits to enforce the plans or (b) suing alleged violators directly if the States and the Agency do not resort to the courts. Without elaboration of that statement, we should note that citizens' dissatisfaction with §113 orders will ordinarily focus on the time permitted for compliance with such orders. As we have previously advised you, we do not believe that §113 orders, without more, will bar citizens from suing to enforce the original deadlines in such cases. 15/

10. The LSD memorandum (pp. 3-4) questions the legality of providing an "opportunity to confer" after issuing an order under §113. Although it may be preferable as a matter of policy to provide the "opportunity to confer" before issuing an order, as the guidelines suggest for all but exceptional cases, the Act does not purport to require this procedure. It requires only that the "opportunity to confer" be provided before an order may "take effect." There is no legislative history with respect to this requirement and, given that the Agency does not presently intend to treat the "opportunity to confer" as a formal hearing, we see no legal objection to the procedure suggested in the guidelines.

11. The LSD memorandum (pp. 5-6) suggests, citing 5 U.S.C. §551(a), that the proposed guidelines will not be legally effective unless published in the Federal Register. You have indicated that the guidelines are, in fact, intended to provide guidance to EPA personnel, rather than to bind other parties, and have asked whether the requirements of 5 U.S.C. §552(a) are applicable in such cases. Our preliminary research on that question suggests

---

15/ The discussion in the text assumes that the questions of permitting citizens to take part in the process of issuing §113 orders is solely one of policy. If so, the protections otherwise afforded to citizens' rights under the Act are proper considerations in determining the policy. The LSD memorandum (p. 5) suggests, however, that an opportunity for citizen participation in the process may be required by recent decisions broadening the concept of standing. Although we believe citizens would be entitled to intervene if the Agency provided hearings before issuing §113 orders, we are unprepared to conclude that they are entitled to take part in an informal §113 conference. See National Welfare Rights Organization v. Finch, 429 F. 2d 725 (D. C. Cir. 1970); cf. paragraph 12, infra. Nor do we believe the decisions on standing require the Agency to provide hearings where none are required by statute or by the Constitution.

that it is more complex than might first appear. 16/ In view of its significance for the Agency, we believe we should refrain from expressing an opinion until we have had an opportunity to examine the question further.

12. Finally, the LSD memorandum (p. 3) suggests that States should be invited to take part in conferences held under §113(a)(4), and that the guidelines should so require. Although this may appear to be solely a matter of policy, we believe it has legal implications as well. A guideline "requiring" that States be invited would (a) eliminate, as a practical matter, the present option of excluding States in exceptional cases; (b) suggest that other interested parties, including the public, are (or should be) entitled to take part in the conferences. As we have discussed, such a guideline could be challenged by the party to whom a §113 order is issued, on the ground that he is entitled to a private conference under §113(a)(4). 17/ Until the issue is resolved, and until the Agency has had more experience under §113, it may be desirable to retain the flexibility permitted by the proposed guidelines.

13. Aside from the points discussed above, most of the comments in the LSD memorandum appear to concern mainly matters of policy. Accordingly, we have not attempted to address all the issues raised by the memorandum. As illustrated by the suggestion that States be invited to take part in §113 conferences, however, some of the policy suggestions may have legal implications that should be considered before the suggestions are adopted.

16/ For example, the Attorney General has taken the position that operating instructions, guidelines, and similar materials intended only for the use of agency staff are exempted from the requirements of 5 U.S.C. §552 (a)(1), but that not all matters of internal management are so exempted. U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 6 (1967). Similarly, where an agency provides opportunities for informal conferences on matters within its jurisdiction, the Attorney General states that "the fact that the practice exists should be stated in the Federal Register" but does not address the question whether internal guidelines concerning such conferences need be published. Id. at 9. Finally, he appears to interpret 5 U.S.C. §552 (a)(2) as requiring public availability (as opposed to Federal Register publication) of such material when they "affect any member of the public," particularly when they contain standards that guide agency action; but not where confidential treatment is necessary "if they are to serve the purpose for which they are intended." Id. 16-17. In short, the question you pose is not readily answered.

17/ For present purposes, we note that the legislative history is silent on the question, which we view as a difficult one.

§ § § § § § §

TITLE: Enforcement of Short-Term Violations of Implementation Plans

DATE: July 5, 1973

BACKGROUND

During a briefing of the Senate and House Staff on Supplemental Control Systems (SCS), a question was raised about Federal enforcement. Specifically, the question concerned the situation where a SCS system was unsuccessful, causing a two or three hour or perhaps a two or three-day violation of an ambient air quality standard. The Staff questioned whether or not EPA was precluded from enforcing. The reason for the uncertainty is that pursuant to §113 of the Clean Air Act, enforcement procedures provide that a source be given 30 days notice of any violation of an implementation plan. Only if the violation continues beyond the 30-day period can an order be issued or an injunction sought.

DISCUSSION

At the outset, it should be clearly understood that the question presented is a difficult one, but it is not a question which arises only in connection with SCS systems. There are many air quality control regions in which there are one or a few significant sources, all of which must have substantial controls to meet the national ambient air quality standards. Assume for the moment that SCS is not used, and permanent controls are applied to all sources. Where one of the sources puts on a precipitator which, instead of getting the required percentage of control, is inefficient and simply does not meet the emission limitation to which the source is subject, enforcement is simple. There is an obvious violation of the emission limitation. The violation will continue beyond 30 days since the precipitator is not adequate. This is no different from the SCS situation where there is a continuous violation of an ambient air quality standard. The violation would not be "continuous" in the sense that it would exist for every hour or every day of a 30-day period. But if the system could be seen to be inadequate, as evidenced by rather frequent violations under certain conditions, a notice of violation would issue and the subsequent proceedings commenced. It is important to note that in both cases the violation of the applicable implementation plan may cause a violation of the national ambient air quality standard and enforcement would essentially be the same. It is true that in some cases there might be some slightly longer delay before we could make the judgment that the SCS system was inadequate, but generally we have a situation where if the system does not work, no problem is presented.

The more difficult situation is the short-term violation. In the terms discussed by the Staff the question was raised as to EPA's ability under §113 to do something when there was an occasional violation of a standard. Again it should be understood that this same problem exists without regard to whether the controls involved are permanent or supplementary. Returning to the hypothetical, in those many regions where there are a limited number of sources which, upon failure of control systems, will result in violations of ambient air quality standards, we fully expect that the short-term violation will be an enforcement problem. Specifically, if a precipitator or other permanent control device breaks down for an hour or a day or any period shorter than 30 days and the plant continues to function, the question of the applicability of §113 is raised.

EPA takes the following view of the situation. First of all, where a precipitator or scrubber or other permanent control device breaks down for a short period of time, is repaired as rapidly as is reasonably possible, and operating practices are such that precautions against the same action being repeated are taken by the source operator, ordinarily there should be and will be no enforcement. The state-of-the-art is not such that sources who in good faith purchase equipment and do their best to maintain and operate it properly, should be penalized for minor violations not within their control. Where, however, there is a pattern of these breakdowns in the case of any single source, EPA, upon a determination that the owner or operator is not taking the necessary steps to prevent such occurences, will treat such breakdowns as continuing violations, i. e., a breakdown of a precipitator every ten or twenty days, which the Agency determines is due to lack of maintenance which the operator should be performing, will be treated as a "continuing violation." We will issue a notice of violation; at the end of the 30 days an order can be issued requiring the owner to perform the required maintenance, or a legal action can be instituted to secure a Court order requiring the action.

This same approach applies to supplementary control systems. As a matter of fact these systems may offer some advantage. Where there is a single violation for a short period of time, it may be possible, without waiting for additional occurrences, to analyze the meteorological and operating conditions which prevailed at the time of violation and order an immediate revision of the criteria which triggers the supplemental control system. If the violations continue with relative frequency, just as in the case where permanent controls are concerned, it will be treated as a continuing violation and a 30-day notice will issue and appropriate proceedings taken to enforce against the violator.

§ § § § § § §

TITLE: Employment of Enforcement Procedures under Section 113 of the Clean Air Act in Concert with National Hearing on Feasibility of Sulfur Oxides Control Technology for Coal-Fired Electric Power Plants

DATE: September 14, 1973

SUMMARY

By memorandum dated August 13, 1973, you have asked us three legal questions. Those questions, and our answers to them, are set out below.

Question 1

May EPA take legal action against Federal (in particular, TVA) facilities under Section 113 of the Clean Air Act?

Answer 1

Though the issue is not free from doubt, our view is that the answer is "Yes," particularly if the facilities in question are owned by TVA.

Question 2

Would a comprehensive "legislative" type hearing on the availability of sulfur oxides control technology held in connection with the issuance of notices of violation under §113 to certain sources satisfy the requirement of that section that recipients of an enforcement order be allowed to "confer" with EPA before the order takes effect?

Answer 2

Yes, if the recipients of the notice were allowed to discuss their own particular situations as well as the status of technology in general. In fact, the rights afforded would in our view be far more than the law requires. Though there is no objection to this, our opinion that we are doing more than necessary should be clearly stated in the Federal Register notice to avoid setting a precedent.

Question 3

May individuals be compelled to appear in person at this hearing and testify under oath?

Answer 3

The question whether personal appearances may be compelled is the closest question presented here. However, we believe there are sound legal arguments under §114 of the Clean Air Act in favor of compelling such appearances by employees of companies that own or operate emissions sources. If such appearances can be compelled, it would follow that false statements could be punished, although most likely no formal oath could be administered.

However, we see no valid way to compel personal appearances by individuals who are not employees of companies that own or operate such emissions sources, or who do not own or operate such sources themselves.

DISCUSSION

1. May EPA sue TVA under §113(b) or §113(c) of the Clean Air Act?

a. The Intent of the Statute

Section 113(a) of the Clean Air Act provides that if the Administrator finds that "any person" is in violation of any provision of an applicable implementation plan, he shall notify them of their violation. If the violation has not been voluntarily corrected within thirty days of this notice, the Administrator may issue a compliance order commanding it to be corrected, and compliance with the order may be enforced either through court orders, §113(b), or by court-imposed fines of $25,000 per day of violation, §113(c).

The word "person" is defined in Section 302(e) as follows:

> The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

This definition, comprehensive as it is, does not include any agency of the Federal government, and it might well be argued that this exclusion shows that Congress did not intend to include such agencies in the definition, and hence did not intend to subject them to the enforcement provisions of §113.

However, the definition of "person" in §302(e) begins "The term 'person' includes (emphasis supplied). Each of the five other definitions in that section begins "the term 'x' means" (emphasis supplied). Both this contrast in language and the common meaning of the word "includes" indicate that when the term "person" is used in a passage of the Clean Air Act, it may encompass entities not explicitly mentioned in Section 302(e) if the context, or the policy of the statute, call for a broader reading.

If the definition in §302(e) is not exclusive, the question is whether a Federal facility may be included in the term "person" by implication. There is a presumption that the word "person," when used in a statute, does not include the Federal government. United States v. Cooper Corporation, 61 S. Ct. 742 (1941). However, the opinion in that case also emphasizes that there is "no hard and fast rule of exclusion," 61 S. Ct. 743-44. Indeed, the case has been cited far more for the second of these two propositions than for the first.

The portion of the Clean Air Act that deals most directly with the duties and obligations of Federal facilities is section 118. It provides that "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government . . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements" unless it has been exempted by the President.

There can be no dispute that this language requires compliance with the substantive emissions limitations of State plans. See memorandum of Jeffrey H. Schwartz to John R. Quarles, Jr., March 27, 1972. It might be argued, however, that the statute in commanding compliance by Federal agencies " *to the same extent* that any person is subject to such requirements" (*emphasis supplied*) is emphasizing that Federal agencies are not "persons" within the meaning of the statute (and hence of §113) but simply should comply with the same substantive emissions control requirements.

This, however, is a technical argument based on one particular reading of an ambiguous passage. That reading, in our opinion, is not consistent with the evidence of Congressional intent contained in the legislative history of §118. The legislative history makes clear that by 1970 Congress had formed a low opinion of the clean-up efforts of Federal agencies under prior law, and that when it passed Section 118 it meant to compel Federal agencies to match the performance of private persons and if possible take the lead in complying with air quality standards.

The prior law had stated:

> It is hereby declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare and with any pollution control agency in preventing and controlling the pollution of the air in any area insofar as the discharge charge of any matter from or by such building, installation, or other property may cause or contribute to pollution of the air in such area. 81 Stat. 499.

and had included in addition an authorization to the Secretary of HEW to establish categories of Federal sources that would need a permit could only be revoked if the Secretary found that pollution from the covered facility was endangering the health or welfare of persons.

Both House and Senate versions of the Clean Air Amendments of 1970 had sections that made Federal compliance with local emissions standards mandatory. The House report said of this section

> Instead of exercising leadership in controlling or eliminating air pollution, the Federal Government has tended to be slow in this respect. The foregoing provisions are designed to reverse this tendency. H.R. Report No. 91-1146 (91st Cong., 2d Sess.) (1970) pp. 4-5.

and the Senate report said

> This section would require every Federal agency with control over any activity or real property to provide national leadership in the control of air pollution in such operations.

> Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution standards by Federal facilities . . . . The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute at will. S. Rep. No. 91-1196 (91st Cong., 2d Sess.) (1970) p. 23 (henceforth cited "Senate Report").

Similar statements were made on the floor of both Houses.

Given such a clear expression of Congressional intent, the rule should apply that a court "cannot, in the absence of an unmistakeable directive, construe [a statue] in a manner which runs counter to the broad goals which Congress intended it to effectuate." F.T.C. v. Fred Meyer Inc., 88 S. Ct. 904, 908 (1968).

It is inconsistent with the Congressional intent expressed above to read section 118 as exempting federal agencies by implication from the full scope of the enforcement mechanism set up to ensure compliance. A reading of the statutory language that would better serve this statutory purpose is to take the phrase "to the same extent" used to connect the descriptions of the compliance responsibilities of federal and non-federal sources as intended to set the two categories of sources it connects strictly equal to each other in respect of their obligations under the Clean Air Act, and by extension to make federal sources as liable as other sources to enforcement under §113.*/ Indeed, it is hard to see how there can be assurance that federal facilities will in fact comply "to the same extent that any person is subject to such requirements" if they are not subject to the same methods of enforcement.

---

*/ It might be argued that the difference in the phrases used in §118 to describe the respective obligations of federal and private facilities also supports the position that Federal facilities are not "persons." The statute uses words of jurisdiction -- "subject to" -- to describe the relationship of private persons to the plan requirements, and these words necessarily imply that legal enforcement of the requirements is possible. In contrast, the words used of federal facilities are "shall comply," and could be read as simply describing what the agencies themselves are called upon to do, without raising any inference of legal enforceability. Although this is a respectable minor argument, it overlooks the fact that the terms "subject to" and "shall comply" may simply be ways of describing the same thing from two different viewpoints. To describe private sources as "subject to" the plan is to describe them from the viewpoint of the plan, as it were, while to use the words "shall comply" of federal agencies may simply describe the same situation from the point of view of the agency and its obligations. If this interpretation is adopted, it can be seen that the use of the words "shall comply" does not support an inference that federal agencies are not subject to a plan any more than the use of the words "subject to" of others indicates that they need not comply. In other words, the passage could just as well be written to say that each federal agency "shall be subject to Federal, State, and interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." In fact, §304 makes clear beyond dispute that Federal (footnote continued on next page)

A federal agency might argue in response to this position that the necessary assurance of compliance will be provided by enforcement actions brought by states and citizens against it under §304, which are clearly authorized, and that there is therefore no need to stretch the Act's language in order to authorize suits by EPA as well. It could support this argument by reference to page 59 of the Senate Report, which, in discussing section 118, states

> The Governor, the Attorney General, or any citizen of any state affected by a failure of a Federal agency to comply with the provision of this Act may seek to enforce [§118] under section 304 of the Act. See also Senate Report p. 37.

No mention is made of EPA enforcement.

However, a failure to state explicitly in a committee report that something is permitted is very weak evidence of Congressional intent not to allow, it and does not negate any inferences that may be drawn from the language and purpose of the statute. See Nat'l Petroleum Refiners Ass'n. v. Federal Trade Commission, slip opinion, No. 72-1446 (D.C. Cir., June 27, 1973) p. 7. In this case, both the purpose of the statute, as set forth in the legislative history, and the structure of §304 viewed in the context of the statute as a whole indicate that EPA suits against Federal facilities were contemplated.

Senator Muskie said twice on the floor of the Senate that the Public Works Committee did not regard the citizen suit provision of Section 304 as the best way of enforcing the Act. See Cong. Rec. pp. S16092 (September 21, 1970); S20598 (December 18, 1970). This argues they did not intend it to be the sole means of enforcing compliance by Federal agencies.

In addition, a careful reading of the text of Section 304 shows that it provides the most direct textual support to be found in the statute for EPA suits against federal facilities.

---

*/ (footnote continued from previous page)
agencies are "subject to" plan requirements in every sense at least where enforcement actions brought by plaintiffs other than the federal government are concerned. But this reading, if it is the correct one, suggests quite clearly that the duties of the Federal agency under §118 are so similar to those of others under other portions of the statute that the only logical way to put them into effect is to regard those agencies as "persons within the meaning of the statute.

Subsection (a) of that section reads in relevant part as follows:

> (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf --
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, . . . as the case may be.

This subsection makes quite clear that a citizen may sue a federal agency to enforce compliance with emissions limitations. However, it also assumes that one of the grounds for such a suit may be that the agency is "alleged to be in violation of . . . an order issued by the Administrator." But such an order can only be issued to a "person" within the meaning of §113(a). If a federal agency is thus a "person" within the meaning of §113(a), it would follow that it was also a "person" within the meaning of §§113(b) and (c), since the main function of a §113(a) order is to give fair warning and encourage voluntary compliance before EPA goes into court under the two succeeding sections.

Subsection (b) of section 304 strengthens the inference that the Administrator may sue a federal agency. It provides that no citizen suit against any source including such an agency may be commenced until the Administrator has been notified. In the case of sources which are not federal facilities, this provision is plainly meant to give the Administrator a chance to join the suit or take enforcement action on his own, and there is no indication in the statute that the same meaning is not intended for federal facilities as well. The next sentence makes the point even clearer -- it provides that no action under Section 304(a)(1) may be maintained

> if the Administrator or [the] State [having jurisdiction] has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order.

Again, the structure of the provision suggests that such a suit might be brought against a Federal agency by the Administrator, and there is nothing in its language or legislative history to cast doubt on such a reading. In fact, the Senate Report indicates a main purpose of §304 was to spur Federal and state enforcement action. See Senate Report, pages 36-37.

Finally, section 304(c)(2) provides that "the Administrator, if not a party, may intervene as of right" in any suit brought under that section. Given that the Administrator may thus participate as an adverse party of record in a suit against a federal facility provided only that someone else has filed the initial complaint, it is hard to see why Congress would have intended to deny him the right to file such suits directly.

This reading of Section 304, if it is the correct one, is highly relevant to the interpretation both of §118 and §113. The Supreme Court has stated:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." [citation omitted] Richard v. United States, 82 S. Ct. 585, 591-92 (1962)

b. The Legal Background

The question whether an enforcement action by one federal agency against another would conflict with precedent or raise serious Constitutional questions is highly relevant to a determination whether Congress intended to authorize such suits by EPA under the Clean Air Act. If significant legal difficulties would be raised by such an authorization, the courts would certainly demand much clearer evidence of Congressional intent to grant it than they would if such background difficulties were absent.

In fact, I have been unable to find any cases at all in which one federal agency sued another to enforce a regulation against it. Though this is not by itself a valid objection to the propriety of such a suit, I think that as a practical matter the courts might well be unwilling to sustain one simply because they had never seen anything like it before.

The courts might resort to any one of four closely related arguments to throw out such a suit:*/

> i. The Constitution requires a "case or controversy" to exist before the courts may rule in a proceeding, and no dispute concrete enough to meet this definition can exist between Executive agencies, since the White House always has power to resolve it.

---

*/ They might also do it by statutory construction, relying on both the arguments advanced in section (a) above and on the presence of authority in this specific field for the principle that statutes which subject the government to suit must be strictly construed, Defense Supplies Corp. v. United States Lines, 148 F.2d 311 (2d Cir. 1945). For a closely related principle, see Federal Power Commission v. Tuscarora Indian Nation, 80 S. Ct. 543, 555 (1960). Given the leading role Congress has assigned to EPA in enforcing the Clean Air Act, to allow EPA to sue other federal agencies would probably increase the burden of litigation on them above that which citizen suits alone would impose.

ii. A court that ruled on intra-Executive matters would be invading the prerogatives of the President to manage the Executive Branch. In other words, the case presents a "political question."

iii. It is a general legal principle that no person may sue himself, and the United States is a single "person" in the eyes of the law.

iv. The Justice Department is by law charged with conducting the government's litigation, and it would be anomalous for it to appear on both sides of a case.

For a general discussion of these arguments, see Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 Harv. L. Rev. 1050-58 (1951).

Nevertheless, courts often hear and decide cases in which two agencies present conflicting positions, and the Justice Department itself has well established procedures by which agencies with differing legal views may present them to the courts for resolution. For a general discussion of this matter, see Stern, "'Inconsistency' in Government Litigation," 64 Harv. L. Rev. 759-769 (1951).

In some instances, one agency simply participates as amicus curiae in a case where another agency and a private person are the parties of record. In others, however, the two agencies are the adverse parties both in fact and name.

The leading case here is United States v. Interstate Commerce Commission, 69 S. Ct. 1410 (1949), though earlier Supreme Court cases had allowed agencies to be parties against each other without discussing the point. See, e.g., Interstate Commerce Commission v. Inland Waterways Corp., 63 S. Ct. 1296, 1303 (1943) (Secretary of Agriculture v. ICC); Interstate Commerce Commission v. Jersey City, 64 S. Ct. 1129 (1944) (Office of Price Administration v. ICC).

United States v. ICC arose out of government shipments by railroad of military supplies to the port of Norfolk during World War II. The applicable tariffs included a fee for moving the supplies from the freight yard to the loading pier, work which the government in fact had done and paid for itself. The Government petitioned the ICC for an order to recover these sums from the railroads, lost, and then challenged the ICC order in court.

The statutory three-judge court dismissed the appeal upon finding that it involved a suit by the United States against itself. United States v. ICC, 78 F. Supp. 580 (D. D.C. 1948). The governing statute provided that suits against the ICC should be brought against the United States as named defendant and the legislative history indicated they should be defended by the Department of Justice. Yet here the United States was also appearing on the other side. In fact, the same Assistant Attorney General had signed the pleadings for both sides. 78 F. Supp. 583.

This made it clear to the court that the United States was attempting to sue itself, and that there was no case or controversy, since "No person may sue himself." The suit was accordingly dismissed.

These same arguments were presented to the Supreme Court, */ which had no trouble rejecting them. Justice Black said:

> There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.
>
> While this case is United States v. United States, et al., it involved controversies of a type which are traditionally justiciable. The basic question is whether railroads have illegally exacted sums of money from the United States. Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection. To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission. In pursuit of the same objective the Government challenged the legality of the Commission's action. This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads. The order if valid would defeat the Government's claim to that money. But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

He went on to dispose in just as summary a fashion of the argument that no suit can be allowed in which the Justice Department would have the duty to represent both sides:*/

---

*/ For summaries of the briefs, see 93 L. Ed. 1453-55.

*/ This is an argument that would be hard to make in any event where the Clean Air Act was concerned. Section 305 does not require the Justice Department to represent EPA, and indeed states explicitly that if the Justice Department decides not to take an EPA case, the Administrator may choose his own lawyers.

> [T]he Commission and railroads emphasize the anomaly of having the Attorney General appear on both sides of the same controversy. However anomalous, this situation results from the statutes defining the Attorney General's duties.
>
> Although the formal appearance of the Attorney General for the Government as statutory defendant does create a surface anomaly, his representation of the Government as a shipper does not in any way prevent a full defense of the Commission's order. The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest. For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses to the Government's charges and claims of other shippers. In this case the Commission and the railroads have availed themselves of this statutory authorization. They have vigorously defended the legality of the allowances and the validity of the Commission order at every stage of the litigation. 69 S. Ct. 1413-14.

Even though the government's real objective in this case was to recover money from some private corporations, the ICC was still a true party in interest. Once the ICC order denying the government's claim had been rendered, the ICC had an institutional interest in defending its validity that was completely separate from and no less real than the financial interest of the railroads in defending it. See Jaffe, Judicial Control of Administrative Action, pp. 537-38. Justice Black recognized this when he referred to the ICC and the railroads as the "real parties in interest," and the Supreme Court has since ruled in intra-governmental suits where no financial recovery for the government was sought. United States ex rel. Chapman v. Federal Power Commission, 73 S. Ct. 609 (1953) (Secretary of Interior challenges FPC's authority to approve a power project); Udall v. Federal Power Commission, 87 S. Ct. 1712 (1967) (Secretary of Interior challenges FPC's authority to approve a power project).

All these cases, however, have involved suits brought to review the rulings of independent agencies*/ made after formal APA adjudications. There are almost no cases on other aspects of intra-governmental litigation -the only ones I found were two from the Second Circuit stating that because a person may not sue himself one government agency may not sue another for money damages, Defense Supplies Corp. v. United States Lines, supra; Luckenbach Steamship Company v. U. S., 315 U.S. 598, 604 (2d Cir. 1963) (Friendly, J.) (dictum) and a District Court case from Tennessee holding for the same reason that the TVA could not take an FHA mortgage interest in land by eminent domain. United States v. An Easement and Right of Way etc., 204 F. Supp. 837 (E.D. Tenn., 1962).

---

*/ Members of the Federal Power Commission may be removed by the President in at least some cases before their terms expire, see p. 21, infra, but the agency nevertheless is recognized as functionally independent.

In my view little weight should be given to opinions which, like the three just cited, rely without analysis on the simple slogan that a person may not sue himself.

According to page 1055 of the Harvard Law Review Note cited above:

> While the rule that the same party cannot be both plaintiff and defendant [i.e., that a person may not sue himself] does have a substantive, as well as a purely formal aspect, this substantive aspect is totally unrelated to whether the parties are nominally identical, as is shown by the leading federal cases embodying its proper application . . . . The formal aspect of the rule is universally recognized as a narrow and technical one traceable to the procedural requirements of common-law pleading.

Justice Black in the ICC case declined to be bound by a rule so thinly justified and held that the slogan itself is not dispositive as long as a genuine controversy is presented.

The substantive side of the rule is that the same interest may not be in effective control of both sides of a lawsuit. Ibid The question viewed from this angle then becomes whether the President is or should be in effective control of both sides of an enforcement action brought by one agency against another, points which are practically identical with points iii and iv of the four listed on page above. To these two points we now turn.

The Supreme Court cases cited established that a petition by an Executive agency subject to presidential control for review of an adjudicatory determination by an independent agency does present a case or controversy and does not impermissibly undermine the authority of the President to manage the government. The question is whether the same would be true of an enforcement action by one executive agency (EPA) against another.

There is almost no authority on this point. But my conclusion is that such a suit should be upheld.

If we look only to the two individual agencies that might be involved in such litigation, and not to the powers superior to them in the government, it is clear that such a suit might in every facatual sense have the elements of concreteness and of an actual and substantial stake on each side that the Supreme Court has held are necessary to the existence of a case or controversy. Aetna Life Insurance Company v. Haworth, 37 S.Ct. 461, 464 (1037); Flast v. Cohen, 88 S.Ct. 1942, 1950-42 (1968).

It still may be, however, that such a suit would either not present a "case or controversy" because of the potential power of the President or resolve it, or that judicial interference in such an intra-Executive matter would violate the "political question" doctrine. The classic definition of that latter phrase was given by the Supreme Court in Baker v. Carr, 82 S.Ct. 691, 710

710 (1962),*/ and reads as follows (with the points numbered for convenient reference):

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In our opinion it would be very hard to argue that points (2), (3), (5), or (6) applied here. Since enforcement suits against Federal facilities will present (as far as their merits are concerned) almost the same questions as suits against private facilities, plainly there is no "lack of judicially discoverable and manageable standards for resolving" them, and it would be possible to decide their merits "without an initial policy determination of a kind clearly for nonjudicial discretion." Since such suits by EPA would only be brought with the concurrence of the Executive, and would be meant to settle the compliance status of individual facilitites once and for all, there would be neither a "potentiality of embarrassment from multifarious pronouncements" nor an unusual need for unquestioning adherence to a political decision already made."

Nor, in our opinion, would a court express "lack of the respect due coordinate branches of government" by deciding such a case. In the first place, such a suit by EPA could as noted above only be brought with Executive concurrence. In the second, it would involve only narrow issues of individual facilities' compliance with standards specified in detail by the states and Congress.

Finally, there is the question whether the issue has been committed by the text of the Constitution to Executive decision.

In the context of a suit by EPA, this is essentially the same question that the inquiry into the existence of a "case or controversy" boils down to - whether to allow such a suit would injure the unity of the executive branch or invade the power of the President to manage it. Professor Jaffe argues that it might:

---

*/ For other cases discussing the "political question" doctrine, see Powell v. McCormack, 89 S. Ct. 1944 (1969); William v. Rhodes, 89 S. Ct. 5 (1968).

> The day-today thrashing out of problems in the cockpit of action brings desire and understanding into highly charged proximity.... And as has been pointed out by very distinguished political and legal philosophers, the lofty intrusion of the judiciary may chill creative responsibility. 'Not to make decisions that others should make,' says Chester Bernard in a much-quoted passage, 'is to preserve morale, to develop competence, to fix responsibility, and to preserve authority.' L. Jaffe, *Judicial Control of Administrative Action* 320-321, (1965) (Jaffe's emphasis).

Jaffe was here speaking of judicial review of official action in general, but these were probably the considerations he had in mind in writing elsewhere without elaboration:

> If one were to assume a case where both officers were subject to the President's authority, his authority and his responsibility for its proper exercise would seem to be the logical forum for the resolution of the conflict. *Id.* at 541.*/

However, the danger of such a "chilling effect" in our particular case is minimized by the language of the statute. The Clean Air Act does not require the Administrator to sue those who violate emissions standards; Section 113 merely says that he "may" sue them. Accordingly, the President has power to protect his authority to manage the government by directing the Administrator not to file a suit in any given case. Where such a suit is filed, it must therefore be presumed to be filed with the President's express or tacit approval and in conformity with his view of his functions.

If the court then refused to resolve the dispute - which might well in every concrete factual sense be a "case or controversy" - the only reason that I think it could give would be that by not acting himself the President was not doing his job of running the Executive Branch as a unitary whole, and that the courts would not do it for him.

In our view, however, there are good reasons why a President might want EPA to bring suits against other Federal agencies under the Clean Air Act.

The Clean Air Act requires federal facilities to comply with emissions limitations to the same extent as other sources, unless they have been granted a Presidential exemption. The law is clear, and any area of discretion for executive policy-making with respect to it is further narrowed by the provision in Section 118 that no agency may be exempted from compliance due to a lack of funds unless it has explicitly asked for those funds and been turned down by Congress. The President's function in such circumstances is to see that federal facilities obey the law.

---

*/ Of course, to say it is the "logical forum" is not necessarily to mean that it is the only proper forum.

> which mitigate centralizing authority. The public interest no longer can be limited to one mask worn by the Attorney General. The United States may incestuously sue itself. [citing United States v. ICC, supra] It may, in the carnival of the public interest, appear in many guises in which if one looks he may see -- without too much effort -- twitching behind the august lineaments of the ICC, the Department of Agriculture, and the Secretary of the Interior, the eager grimaces of railroad, farmer, and rural electrifier. All of these interests are represented in this mode on the Congressional and administrative stage; it has come to be thought appropriate that they be so represented in the courts of law when a legal issue is relevant to the exercise of power. Jaffe, ibid pp. 541-42.

c. The Special Status of TVA

The more independent of Presidential control an agency is under the law, the less of an invasion of executive unity or Presidential prerogatives would be caused by an EPA suit against it and, accordingly, the easier it would be to establish EPA's right to sue it.

The agencies in the Executive Branch least subject to Presidential control are the independent regulatory agencies, such as the ICC and the FTC, whose members may not be removed by the President during their term of office. Humphrey's Executor v. United States, 55 S. Ct. 869 (1940). As noted above, the right of other Federal agencies to challenge in court the decisions of these agencies is well established.

TVA does not fall into this category, both because its governing statute gives the President specific detailed responsibilities relating to TVA management, 16 U.S.C. §§831(c)(k)(c), 831(e), 831H, 831o, 831u, 831v, and because the directors may be removed by the President before the expiration of their terms and for reasons not explicitly stated in the statute. Morgan v. Tennessee Authority, 115 F.2d 990 (8th Cir. 1940).

On the other hand, the structure of the Tennessee Valley Authority Act of 1933, and the circumstances of TVA's establishment, indicate that TVA was to retain a considerable degree of independence.

TVA is not the normal type of federal agency. It is a Federally chartered corporation, 16 U.S.C. §831, run by three directors appointed by the President with the advice and consent of the Senate, 16 U.S.C. §831a. The directors serve nine-year terms with one term expiring every third year, and the statute specifies that "[t]he board shall direct the exercise of all the powers of the corporation", 16 U.S.C. §831a, "including the power to hire all necessary subordinate employees without regard to civil service rules. 16 U.S.C. §831b. However, "no political considerations may enter into the selection or promotion of any employee." U.S.C. §831e. One of TVA's corporate powers is to hire attorneys of its choice, 16 U.S.C. §831b, and these attorneys, rather than the Justice Department, have in fact appeared for TVA in the various lawsuits filed against it by environmentalists. See, e.g., the counsel of record listed in Environmental Defense Fund v. TVA, 5 ERC 1183 (E.D. Tenn. 1973); Environmental Defense Fund v. TVA, 4 ERC 1150 (6th Cir. 1972); Morris v. TVA, 4 ERC 1948 (N.D. Ala. 1972). Nor is TVA subject to the restrictions of the annual budget procedure to the same extent as other government agencies. Though it must submit an annual "business-type budget" to OMB, 31 U.S.C. §847, which the President can alter, 31 U.S.C. §848, 31 U.S.C. §§849 and 850 reduce the importance of these procedures considerably by reconfirming the prior authority of TVA to deduct its operating expenses from its revenues before turning the balance over to the Treasury. See 16 U.S.C. §§831h(b) and 831y.

The House and Senate Reports on the Tennessee Valley Authority Act of 1933 are brief and unenlightening, see H.R. Rep. No. 48 (73d Cong. 1st Sess.), S. Rep. No. 23 (73rd Cong., 1st Sess.), and President Roosevelt took an active interest in the launching and early years of the Authority, Pritchett, The Tennessee Valley Authority: A Study in Public Administration (1943) pp. 185-221. Nevertheless, it was the conclusion of at least one commentator that

> There can be no doubt that Congress did intend in creating the TVA, to depart widely from the ordinary bureau pattern and to establish an agency with a considerable measure of independence from presidential control. Ibid, p. 213. See also Lilienthal, TVA: Democracy on the March (1944) pp. 176-77.

It is not necessary to an inter-agency lawsuit that one of the agencies be headed by members who do not serve at the pleasure of the President. Members of the FPC are not protected by Humphrey's Executor, see I Davis, Administrative Law Treatise, §1.07, and yet a suit by the Interior Department against the FPC was sustained in U.S. ex rel Chapman v. FPC, supra.

In fact, the better view appears to be that there is no touchstone for determining when an agency is to be "independent", but that the answer should turn on an examination of the particular nature both of the agency and the function at issue in the lawsuit. Jaffe, Judicial Control of Administrative Action p. 541. If such an approach is adopted, the arguments set forth above on Congress' view of TVA's independence could be combined with the lack of latitude for policy-making under the Clean Air Act in determining to what extent TVA should comply with implementation plan requirements to make a strong case for classifying TVA with the "independent" agencies where an enforcement action against it by EPA is concerned.

2. The Requirement of an "Opportunity to Consult" Under §113.

Section 113(a)(4) of the Clean Air Act states that an order under §113 "shall not take effect until the person to whom it was issued has had an opportunity to confer with the Administrator concerning the alleged violation". In a draft memorandum dated August 16, 1972, from Gerald Gleason to Edward Reich, this office has stated that the "opportunity to confer" required by the sentence quoted above does not require a public hearing of any nature, but simply requires that the person concerned have an opportunity to meet with a responsible EPA representative and present facts and argument to him. Accordingly, the general "legislative" type hearing you propose would more than satisfy the applicable legal requirements as long as sources which had received an order were not prevented from submitted facts and arguments concerning their own individual problems.

Of course, there is no legal objection to doing more here than the law requires. See United States v. Florida East Coast Railroad, 98 S.Ct. 810, 816 n. 6. However, the notice of the hearing should make clear our view that we are in fact doing more than the law requires to minimize the danger of setting a precedent for future §113 hearings.

3. May Individuals be Compelled to Appear in Person at the Proposed Hearing and Testify Under Oath?

Section 114 of the Clean Air Act provides that "the Administrator may require the owner or operator of any emission source to . . . establish and maintain such records, . . . make such reports, . . . and . . . provide such other information, as he may reasonably require" as long as it is done "for the purpose [inter alia] of developing or assisting in the development of any implementation plan under Section 110 . . . or . . . of determining whether any person is in violation of any . . . requirements of such a plan".

Compliance with this provision can be enforced by "appropriate relief, including a temporary or permanent injunction" under authority of §113(b).

The law is clear that EPA may require the "reports" mentioned in the statute to be filed whenever it pleases, and to discuss specific questions in detail even where they are the subject of pending or threatened judicial proceedings. In United States v. Morton Salt Co., 70 S.Ct. 357 (1950) (Jackson, J.), the Supreme Court upheld the power of the Federal Trade Commission acting under a similar statute to require extremely detailed reports from companies subject to a court order for the purpose of determining whether they were still in compliance with it. The Court said that to characterize the requirement of these reports as a "fishing objection" was no valid objection to it, since administrative agencies have the right to go on such expeditions, and that it was "sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." 70 S.Ct. 369.

There can therefore be little doubt that the companies which will be asked to the hearing could be required to file reports containing essentially the same information EPA hopes to get from them by oral examination of their employees. The question is whether the appearance of their employees to submit to oral examination may also be compelled.

The legislative history of the 1970 Admendments, which added the passages quoted above to the Clean Air Act, casts no light on this question. However, I have not found any case in which the personal appearance of a witness was compelled by an administrative agency except through the issuance of a subpoena. Congress has been very liberal in granting such a subpoena power To administrative agencies. See 49 U.S.C. §12 (ICC); 15 U.S.C. §49 (FTC); 15 U.S.C. §§77s(b), 77uuu(a), 78 (u)(b), 79r(c), 80a-41(b) and 80b-9(b) (SEC); 15 U.S.C. §717m(c), 16 U.S.C. §825f(b) (FTC); 47 U.S.C. §409(e) (FCC); 42 U.S.C. §2201(c) (AEC); 41 U.S.C. §39 (NLRB); 46 U.S.C. §§821, 826 (Federal Maritime Commission).

In addition the power to subpoena witnesses for purposes not relevant here has been explicitly granted to EPA by §307 of the Clean Air Act.

Finally, §113(c), which provides for punishing those who make false statements to EPA, only forbids such statements if they are made "in any application, record, report, plan or other document filed or required to be maintained under this Act". (emphasis supplied) This provision is obviously meant to be read in parallel with §114, and the fact that the underlined words indicate that only the furnishing of false information in written form was meant to be punished therefore also indicates that only the furnishing of written information may be compelled under §114.

Though the arguments for such a reading are strong, they are not decisive. Administrative agencies have considerable discretion to interpret their own statutes, Udall v. Tallman, 380 U.S. 12, 16 (1965), and it is a rule of statutory construction that courts "may not 'in the absence of compelling evidence that such was Congress' intention. . .prohibit administrative action imperative for the achievement of an agency's ultimate purpose.'" U.S. v. Southwestern Cable Co., 88 S.Ct. 1994, 2005 (1968). See also Weinberger v. Bentex Pharmaceuticals, Inc., 93 S. Ct. 2488, 2494 (1973). This policy could be invoked here, as the policy reasons supporting a requirement that certain persons attend the proposed hearing are plainly very strong.

There is no "compelling evidence" of Congress' intent to prevent such appearances. The legislative history, as noted above, is silent. Section 114, in stating that "reports" may be required, does not specify that they must be written or that they may not consist of transcripts of oral examinations. Even if this reading is rejected, the argument can be made that when §114 has allowed EPA to require "records" and "reports" it has exhausted the possible categories of written material, and that the power to compel the furnishing of "other information" must mean information given orally.

Similarly, the provision for judicial enforcement does not rule out judicial compulsion of personal appearances, since it is written in the most general and comprehensive terms to allow the courts to enforce compliance with the requirements of §114 by granting "appropriate relief, including [but, by implication, not limited to] a permanent or temporary injunction. . ." §113(b).

Even the false statement prohibition in §113(c) could be made to conform to this reading. By its terms it requires the false statement to be made in a "document" "filed" with EPA. The verbatim transcript of testimony that will be taken may legitimately be regarded as such a document, particularly if the witness were given a chance to correct any misstatements he might have made under the pressure of cross-examination. Such a reading of the section would make sense as an interpretation of Congressional intent, since it would imply that Congress did not intend to deny EPA the power to hear live witnesses, but only meant to require a record of their testimony to be made- and (perhaps) verified with them before any prosecution for false statements could be brought.

Unfortunately, by the terms of §114 information can only be required from the owners or operators of emissions sources. The statute is clear, and an administrative agency has no power apart from statute to compel people to supply it with information. Accordingly, vendors of emissions control equipment will have to appear voluntarily at the proposed hearing if they are to appear at all.

You have asked whether oaths could be administered in the proposed hearing. Though I have not researched the point very much, I doubt an oath may be administered unless there is express authority to administer it. However, the same purpose could be served by reminding each witness as he took the stand that the transcript of his remarks after he had had an opportunity to review it would be regarded as furnished subject to the penalties of §113(c).

SECTION 114 OF THE CLEAN AIR ACT -- INSPECTIONS, MONITORING AND ENTRY

TITLE: Requirements Under Section 114

DATE: December 21, 1972

MEMORANDUM OF LAW

FACTS

In connection with the gathering of information for the development of new source performance standards for the diammonia phosphorus process, OAP has recently approached the Atlantic Richfield Company plant in Fort Madison, Iowa, regarding emission sampling there, having determined that the plant represents "best demonstrated technology" for the control of floride emissions. In order to sample emissions from this source in accordance with test methods prescribed in 40 CFR Part 60, new sampling ports must be placed in the rubberlined steel stack and a scaffold must be erected to reach these ports. The company has objected to the installation of temporary scaffolding which EPA has selected, on the basis that a permanent platform will be necessary in order that the ports may be checked for corrosion on a regular basis. The cost of temporary scaffolding has been estimated at from $5,000 to $7,000 and the cost of a permanent platform at $14,000.

We have discussed by telephone the possible use of §114 of the Clean Air Act to require the company to install such facilities as are necessary to enable EPA to sample emissions from the source in a manner acceptable to EPA.

QUESTION #1

Does §114 of the Clean Air Act provide the Agency authority to require a source to make available to EPA adequate means of access to obtain emission samples from such source, in connection with the development of new source performance standards?

ANSWER #1

Section 114 provides the Agency broad authority, for the purpose of developing a new source performance standard, to require source owners or operators to sample emissions as prescribed by the Agency and to sample any emissions which the source owner or operator could be required to sample. We conclude that included within those authorizations is the power to require the owner or operator to provide reasonable access to the appropriate sampling point in order that the Agency may sample emissions.

DISCUSSION

1. The pertinent language of §114 is as follows:

   (a) For the purpose of developing...any standard of performance under section 111...

> (1) The Administrator may require the owner or operator of any emission source to... (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)..., as he may reasonably require; and
>
> (2) the Administrator or his authorized representative, upon presentation of his credentials--...
>
> > (B) may at reasonable times... sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

2. As we discussed by telephone, since EPA is expressly authorized to require the source owner to sample emissions in accordance with methods, at locations, at intervals and in the manner which the Administrator dictates, the authority to require the source to provide access to the proper sampling points is implicitly included. Accordingly, if special means of access to the sampling points is required in order for EPA to make the samples, EPA may require the source to construct such means of access at the source's expense.

3. EPA may require no more of the source than is reasonably necessary to obtain access for the period of time necessary for sampling, and if temporary scaffolding will suffice, EPA may not require permanent platforms. If the source insists that permanent platforms are necessary although EPA prescribes temporary, the additional requirement is self-imposed.

4. With respect to your question regarding the propriety of EPA assuring in the costs of permanent platforms by funding that construction cost in the amount of the cost of temporary scaffolding, we see no legal impediment. However, if you should desire our Grants and Procurement Division to consider that question, we will be happy to refer it to them for a formal opinion.

§ § § § § § §

TITLE: Fifth Amendment Limitations on use of §114

DATE: August 7, 1972

MEMORANDUM OF LAW

QUESTION

To what extent is the Administrator's information-gathering role under §114 of the Clean Air Act limited by the Fifth Amendment privilege against self-incrimination?

ANSWER

A natural person, an unincorporated sole proprietorship, and possibly a partnership of limited size may claim the privilege against self-incrimination in response to a §114 request for oral or written answers, and for the production of private documentary materials which are not required to be kept by government regulation. In general, however, no warning need be given concerning one's privilege against self-incrimination, as long as there is no custodial interrogation.

OUTLINE OF DISCUSSION

1. To whom is the privilege available?

    a. Corporations

        (1) In general
        (2) Solely-owned, closely-held corporations

    b. Associations

        (1) Labor unions
        (2) Other associations
        (3) Partnerships

    c. Individuals

2. What material may be protected under the privilege?

    a. Documentary material

        (1) In general
        (2) The records of others (Corporate or organizational records)
        (3) Required records

            (a) In general
            (b) Required by EPA laws or regulations
            (c) Required by other laws or regulations

    b. Oral material, including interrogatories

3. Can the privilege be taken away by grant of immunity?

4. Must a warning be given as to one's rights to claim the privilege?

DISUCSSION

1. To whom is the privilege available?

a. Corporations.

(1) In general.

(a) The privilege against self-incrimination is not available to a corporation. A corporation "cannot resist production upon the ground of self-incrimination 1/." Furthermore, corporate documents must be produced even if they may incriminate the custodian possessing them 2/.

(b) If interrogatories are directed to the corporation, an officer may have the right to invoke his own personal privilege, but then cannot shield the corporation. If the corporation has someone who can answer the interrogatories without incriminating himself, it must produce him. "[T]he corporation could not statisfy its obligation simply by pointing to an agent about to invoke his constitutional privilege 3/.

(2) Solely-owned, closely held corporations.

(a) If no one could answer interrogatories addressed to a corporation without subjecting himself to a "real and appreciable" risk of self-incrimination, it would be a "troublesome question," according to the Supreme Court's dictum in United States v. Kordel 4/. Such could well be the case with a closely-held corporation.

(b) On the other hand, the documents of even a closely-held corporation are not subject to the privilege, even though the only person available to produce them is incriminated by their contents. "In recent years numerous challenges on Fifth Amendment grounds have been raised with respect to the records of solely owned and closely held corporations. The courts have uniformly rejected the privilege claims 5/.

1/ Wilson v. United States, 221 U.S. 361, 382, (1911).

2/ See text at note 16, infra, under paragraph 2a(2) of this memo.

3/ United States v. Kordel, 397 U.S. 1, 8 (1970).

4/ Id. at 9.

5/ Lipton, Constitutional Issues in Tax Fraud Cases, 55 A.B.A.J. 731 (1969), citing United States v. Crespo, 381 F. Supp. 928 (D. Md. 1969) and cases cited therein, which include the Second, Third, Eighth, and Ninth Circuits (emphasis added). There have been no contrary holding as to records since Crespo. The rejection of the privilege claims is based on denial of the privilege to corporations, text at note 2, supra. One commentator has argued, "it seems unreasonably to deny a constitutional right because the individual claimant has chosen to do business under the corporate form." Note, Required Information and the Privilege Against Self-Incrimination, 65 Colum L. Rev. 681, 686 (1965). the denial of the privilege to one-man corporations is also criticized in Note, 78 Harv. L. Rev. 455 (1964). The Court has drawn a sharp distinction between oral testimony, (including answers to interrogatories addressed to the corporation), and corporation documents. A corporation is incapable of speaking or writing, but it can own documents. In the Kordel case, supra note 3, the Court cites with continuing approval Curcio v. United States, 354 U.S. 118 (1957), which draws the distinction. See discussion in paragraph 2b of this Memo, at note 24, infra.

b. Associations.

(1) Labor unions. The privilege was denied to a labor union in United States v. White 6/. the Supreme Court based the power to compel the production of documents not upon the existence of a state charter of incorporation, but on the inherent power of the Government to enforce the laws, limited only by the necessity to protect personal rights. The privilege cannot be invoked on behalf of an organization which "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group intrest only 7/."

(2) Other associations. Subsequent decisions have denied the privilege to such unincorporated associations as the Civil Rights Congress, 8/ the Communist Part, 9/ and the Joint Anti-Fascist Refugee Committee 10/.

(3) Partnerships. there have been conflicting decisions as to whether the privilege should be denied to business partnerships 11/. the distinctions are sometimes made on the basis of size, although other factors (such as being a limited, rather than a general, partnership) are also sometimes considered 12/. Under the White test, 13/ size and activities alone would seem to be the considerations.

c. Individuals. Individuals, natural persons do have the right to claim the privilege. This would seem to cover unincorporated sole proprietorships, although arguably the White test could bring even some of these under the exception to the privilege.

6/ 322 U.S. 694 (1944).

7/ Id. at 701.

8/ McPhaul v. United States, 364 U.S. 372, 380 (1960).

9/ Rogers v. United States, 340 U.S. 367, 372 (1951).

10/ United States v. Fleischman, 339 U.S. 349, 358 (1950).

11/ These are discussed in Note, Privilege Against Self-Incrimination Held Not Available to a General Partner Holding Records of a Large Limited Partnership, 63 Colum. L. Rev. 1319, 1321 (1963).

12/ See, e.g., United States v. Silverstein, 314 F. 2d 789 (2d cir. 1963), where the privilege was held not available to a general partner (one of three) holding the records of each of five large, limited partnerships consisting of from 25 to 147 partners. Analogy to the corporate form was also important in this case: "the choice of this form of business organization was necessarily an election to submit a greater degree of governmental intervention than would be true of a simple common-law partnership, and to more closely approximate the corporate form." Id. at 791.

13/ See text at note 7, supra.

In any case, there are other large exceptions even for individual, natural persons as to what materials may be protected. These are discussed below under paragraph 2a of this memo, concerning documentary material.

2. What material may be protected under the privilege?

a. Documentary material.

(1) In general. The Court in Boyd v. United States, 14/ said, by way of dictum, that private papers are protected by the Fifth Amendment privilege. That dictum has been followed consistently and was reinterated in Gilbert v. California, 15/ although exceptions have been made, including those which follow.

(2) The records of others (corporate or organizational records). In general, possession without ownership is not sufficient to support a claim to the privilege even when the documents may incriminate the possessor. This is definitely true if the owner is a corporation or other impersonal organization. Officers may be in possession of records owned by another - namely, by the corporation.

> "Officers of corporations and other non-privilege groups cannot prevent use of their organization's records against them by asserting the privilege against self-incrimination. The officers are simply custodians of the records, and must produce and identify them, even if they contain information which is personally incriminatory 16/."

(3) Required records.

(a) In general. another restriction on the use of the Fifth Amendment was recognized by the Court in Shapiro v. United States. The case involved procurement of information required by the Government's price control program. The Court said that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which

---

14/ 116 U.S. 616 (1886).

15/ 384 U.S. 757 (1965).

16/ Note, 65 Colum. L. Rev. 681, 685 (1965), supra note 5, summarizing the holdings of United States v. White, supra note 6, and Wilson v. United States, 332 U.S. 361 (1911). The Ninth Circut has held that possession alone is sufficient to support a claim to the privilege when the owner is a natural person. The taxpaper claimed the privilege as to his accountant's papers in his possession. United States v. Cohen, 388 F. 2d 464 (9th Cir. 1967). The Third Circuit has characterized the Cohen case as "against the weight of authority" in other circuits, giving citations. United States v. Widelski, 452 F. 2d 1, 5 (3rd Cir. 1971).

are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'" 17/ Such documents have "public aspects" are are not protected. At least one commentator says the rational here was also a "custodial" theory i.e., the papers were held in custody by the government 18/.

(b) Required by EPA laws or regulations.
Section 114(a)(1)(A) and (B) gives the Administrator power to require recordkeeping and reporting. 19/

On the other hand, the broad language of §114(a)(1(E) ("other information") probably cannot give any greater right to information under the Shapiro doctrine. It would seem that the law or regulations would have to spell out in advance what information must be kept or recorded. 20/

17/ 335 U.S. 1 (1948). Recently the supreme court has recognized limitations on the required records doctrine. Requirements for registration as Communists, Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), gamblers, Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968), and holders of firearms, Haynes v. United States, 390 U.S. 85 (1968), have been held to violate the privilege against self-incrimination. On the other hand, in California v. Byers, a plurality of the Court decided that requirements for disclosure of names and addresses of drivers involved in automobile accidents "simply do not entail the kind of substantial risk of self-incrimination involved in Marchetti, Grosso, and Haynes." 402 U.S. 424, 431 (1971). Since the statute applied to the public at large and most accidents do not result in criminal prosecutions, dirvers cannot be considered either a select group, or one highly suspect of criminal activity. Id.

18/ Note, 65 Colum. L. Rev. 681, 685 (1965), supra Note 5.

19/ The Court is aware of such requirements in the field of pollution control. In California v. Byers, 402 U.S. 424; 431 (1971), the so-called California Hit and Run Case, the Supreme Court mentioned the "many burdens" imposed on the constituents of an organized society, including the fact that "industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere," with a reference to other examples in the Shapiro decision (see text, supra, at note 17). "In each of these situations there is some possibility of prosecution -- often a very real one -- for criminal offense disclosed by or deriving from the information which the law compels a person to supply.... But under our holdings the mere possibility of incrimation is insufficient to defeat the strong policies in favor of...disclosure...." Id.

20/ The question of what is necessary to make an otherwise private record into a "required" one has not been researched for this Memo. But for the government to "require" a record to be maintained would appear to involve a prior command on the part of the government. It should be emphasized that this required record doctrine is only needed when documents cannot be obtained under other theories -- such as corporate documents. In those other situations, §114(a)(1)(E) is definitely of value.

(c) Required by other laws or regulations. In United States v. Sullivan,[21] a bootlegger was prosecuted for failure to file an income tax return and the Court held that he had no privilege even though he claimed that filing a return would have tended to incriminate him by revealing the unlawful source of his income.[22]

It would seem, then, that EPA can obtain information required by other regulations than its own. Such information could be included within the category of "other information" under §114(a)(1)(E).[23]

b. Oral material, including interrogatories. Although a custodian of another's books may be required to produce the documents, the Supreme Court held in Curcio v. United States,[24] that he may not be required to explain the records he has produced, or reveal the whereabouts of records which he does not possess. That would lead to convicting him "out of his own mouth."

More recently, in United States v. Kordel,[25] the Court said that an officer of a corporation may himself refuse to answer interrogatories which would incriminate him personally, at least where others could answer them, citing the Curcio decision.

---

[21] 274 U.S. (1927).

[22] Contra, Garner v. United States, 41 LW 2004 (June 5, 1972), where the Ninth Circuit held that to use a gambler's income tax return to convict him in a criminal prosecution unrelated to the tax laws violated his privilege. The court questioned the viability of the Sullivan doctrine today, in light of subsequent cases. But the Supreme Court in California v. Byers, 402 U.S. 424 (1971), mentioned the Sullivan case with continued approval. So the Ninth Circuit would seem to be out of step with the present Supreme Court.

[23] It is possible that EPA can obtain information required to be kept by even a different jurisdiction than the Federal Government -- that is, by state laws or regulations. Although the cases reviewed have dealt with Federal information-gathering under Federal recordkeeping requirements or, in the Byers case, State information-gathering under State recordkeeping requirements, there is no apparent reason that the Shapiro doctrine would not extend to Federal information-gathering under State recordkeeping requirements.

[24] 354 U.S. 118 (1957).

[25] Supra note 3.

3. Can the privilege be taken away by grant of immunity?

A witness who has been granted immunity against prosecution cannot refuse to testify. 26/ The immunity must cover both State and Federal prosecution. 27/ Federal witness immunity acts are widespread. 28/ It has not been determined whether there is one applicable to EPA information-gathering under §114.

4. Must a warning be given as to one's rights to claim the privilege?

The principle which has been established in tax investigations is summarized in the statement: "Basically, the courts hold that the Miranda warnings need only be given to individuals who are in custody." 29/ If an EPA investigator were to confront a suspected polluter personally with a request for information, it would seem analogous to the investigation of civil and criminal tax issues, as well as other areas of investigation. 30/

26/ Ullman v. United States, 350 U.S. 422 (1956).

27/ Murphy v. Waterfront Commission, 378 U.S. 52, 77-78 (1964).

28/ See Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568 (1963).

29/ Lipton, supra note 5, at 733. See United States v. Stribling, 437 F. 2d 765 (6 Cir. 1971), and cases cited therein relating to tax investigation. Only the Seventh Circuit recognizes a right to a warning. However, the Internal Revenue Service has its own regulations requiring that warnings be given, and the Fourth Circuit has held that failure to follow the regulations invalidated a prosecution. United States v. Heffner, 420 F. 2d 809 (4th Cir. 1969).

30/ This question has not been exhaustively researched for this Memo, but there is much useful information in Note, 46 Ind. L.J. 361 (1971), as to tax cases.

TITLE: Delegation of Authority to Make Emission Data Public

DATE: February 11, 1972

FACTS

40 CFR 51.11(a)(6) requires a State to have legal authority to make emission data from stationary source available to the public as part of its implementation plan required under section 110 of the Clean Air Act, as amended. At least one State has made a formal request to a Regional Administrator that this authority be delegated to the State pursuant to section 114(b)(1).

DISCUSSION

How is the authority to make emission data available to the public delegated to a State under section 114?

ANSWER

EPA must delegate all of the authority contained in section 114(a)(1) and 114 (a)(2) to the State. The data obtained by the State pursuant to this delegated authority will then be available to the public as provided in section 114(c).

DISCUSSION

1. Section 114(b)(1) states that:

> Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section (except with respect to new sources owned or operated by the United States).

Section 114(c) provides that:

> Any records, reports or information obtained under subsection (a) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act. (emphasis added)

2. Because the provisions of section 114(c) making emission data available to the public apply to records, reports or information obtained under section 114(a) and not to information obtained under State law, it is not possible merely to make a delegation to the State of the authority to make the emission data

available to the public. To satisfy the request of the State, the Administrator must delegate, pursuant to section 114(b)(1), the authority provided him in section 114(a)(1) and (2) to obtain emission data. We presume that the State would at least need authority to require installation, use and maintenance of monitoring devices, to require sampling of emissions, to enter for inspection and sampling purposes and to obtain such other information regarding emissions as the State may reasonably require. To the extent the State feels other section 114 authority would be needed to obtain emission data, we should delegate that to it. The information gathered by the State pursuant to this delegated Federal authority will then be available to the public as provided in section 114(c).

3. While the State probably has not requested delegation of this other authority, this is the only appropriate means of satisfying their request. First, section 114(c) only applies to information obtained under section 114(a). Second, a simple delegation of authority to make emission data public would conflict with State law which presumably requires that such data be held confidential.

We do not believe it possible to supersede a State confidentiality provision with Federal law as applied to data acquired pursuant to State information-gathering authority.

4. When delegating this authority, EPA must be sure that the State understands its emission data gathering activities will be proceeding under Federal law. And to prevent any later misunderstandings, the State should advise sources of the nature of its authority. If this office can assist in the delegation or in advising the States of the scope of the delegation, please contact us.

§ § § § § § §

TITLE: Monitoring of Ambient Air

DATE: November 13, 1972

Reference: Memorandum from Theodore R. Rogowski, Region X, to Alan Kirk, II, "Application of Provisions Contained in Section 114(a) . . . .," November 1, 1972

MEMORANDUM OF LAW

FACTS

The Air Programs Branch, Region X, would like to monitor ambient air quality for SO_2 concentrations near the Bunker Hill Company, in order to develop an implementation plan control strategy for meeting the SO_2 secondary standards. Questions have been raised regarding their authority to require the Company to do the monitoring or to enter the property and conduct the monitoring or measurement themselves.

QUESTION #1

Can the Administrator require the owner or operator of an emission source to measure ambient air quality in the vicinity of the source?

ANSWER #1

There is legal support for the position that this authority exists under section 114(a)(1) of the Clean Air Act.

DISCUSSION

1. For specified purposes, including the development of an implementation plan --

> the Administrator may require the owner or operator of any emission source to . . . (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information, as he may reasonably require . . . .

§114(a)(1).

2. Each of the subsections of §114(a)(1) can be read separately as giving the Administrator broad authority which could include requiring measurement of ambient air quality by the owner or operator. In no case is there any express limitation on the Administrator's authority other than reasonableness and the purposes of section 114. Pursuant to subsection (C), the lack of restriction on the kind of monitoring equipment and the explicit authority to require the owner or operator to "use" it appears broad enough to require that ambient air quality monitoring be done under this subsection. In subsection (D) it is specifically stated that emission sampling shall be done "in accordance with such methods . . . and in such manner as the Administrator shall prescribe," There is nothing in the legislative history to indicate that Congress intended to restrict the Administrator's information-gathering powers to requiring the sampling of emissions only in the stacks of sources. An emission may logically be "sampled" after it has become mixed with the ambient air, by means of ambient air quality monitoring. The development of an implementation plan, including decisions on the need for various controls, may require an analysis of the impact of emissions on the ambient air in various locations. In subsection (E) the Administrator is given broad power to require the source to provide "such other information" as he may need, which could include data on ambient air concentrations of pollutants emitted by the source.

3. Requiring the source owner or operator to measure ambient air quality levels appears to be particularly justifiable where those levels are attributable to emissions which are exclusively or predominantely his own. This is the situation in a Priority IA Region, such as at Bunker Hill, where the classification as Priority I (a region having the most serious air pollution problems) is based on air quality levels "reflecting emissions predominantely from a single point source," 40 CFR §51.3(c), and that source is the one being asked to do the monitoring.

QUESTION #2

Does the Administrator have the authority to sample ambient air quality on the premises of the source, or only to sample stack emissions?

ANSWER #2

There is legal support for the position that the Administrator has the authority under either §114(a)(2)(A) or §114(a)(2)(B) to measure ambient air quality on the premises.

DISCUSSION

1. For specified purposes, including "developing or assisting in the development of any implementation plan under section 110," the Administrator or his authorized representative

> (A) shall have a right of entry to, upon, or through any premises in which an emission source is located . . ., and
>
> (B) may at reasonable times . . . inspect any monitoring equipment or methods required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

§114(a)(2).

2. The Administrator may have authority to monitor emissions under his "right of entry," since the Act does not impose any restrictions or conditions on that right of entry. For the purpose of "developing or assisting in the development of [an] implementation plan under section 110," it would appear logical, and sometimes necessary, for him to conduct ambient air quality monitoring.[1]

3. The Administrator may also rely upon subparagraph (B) to set up his own monitoring program. As noted in paragraph 2 of the Discussion to Question #1, there is nothing in the legislative history to indicate that Congress intended to restrict his information-gathering powers to sampling of emissions in the stacks of sources. An assessment of the impact and dispersion of a source's emissions for the purpose of developing implementation plans must include measurement of the emissions at several locations. Presumably, when Congress authorized the Administrator to obtain information, it intended to provide all the information-gathering power necessary for the performance of that task.

---

[1] A source owner might argue that the right of entry is only for the purpose of performing other functions authorized by section 114, such as inspecting equipment or sampling emissions which the owner is required to sample. However, we do not believe that the subsection (A) right of entry is limited to subsection (B) activities. The two subsections are connected by the conjunction "and", rather than by a phrase such as "in order to" or "for the purposes of."

4. Although the statute can be read as allowing the Administrator to sample only those emissions which the owner or operator has actually been told to sample under §114(a)(1)(D), we believe a broader reading could also be defended. Subparagraph (B) may be read as giving the Administrator general authority to monitor any polluting emissions on the premises of the source without any formalistic, prior requirement that the owner or operator also monitor the emissions. Under this broader reading, subparagraph (B) can be interpreted as referring to the type of emissions which the owner may be required to sample when directed by the Administrator. However, even if the source must have been previously told to sample the emissions, there is no requirement in subparagraph (B) that the Administrator's sampling take place in the same manner. Thus, the Administrator could sample emissions through ambient air quality monitoring even if the owner or operator were only required to sample stack emissions.

QUESTION #3

To what "premises" does the Administrator have the right of entry under §114?

ANSWER #3

The Administrator has a right of entry for the purpose of developing or assisting in the development of an implementation plan to any tract of land which is identifiable as the "premises" in which an emission source itself is located. This would include an adjoining tract owned or operated by the owners or operators of the emission source, particularly if the adjoining land is in some way related to the emission source.

DISCUSSION

1. Section 114 of the Clean Air Act says the Administrator or his authorized representative, for specified purposes, "shall have a right of entry to, upon, or through any premises in which an emission source is located . . . ." §114(a)(2). The evolution of language clearly is from the narrower terms in S. 4358 of "building, structure, or facility" and the narrower terms in H.R. 17255 of "establishment" to the broader concept in the Act of "any premises in which an emission source is located." The word "premises" is defined by Webster's Seventh New Collegiate Dictionary at page 671 as:

> a: a tract of land with the buildings thereon
> b: a building or part of a building usually with its grounds or other appurtenances

The word does not have one fixed and definite meaning. As the court stated of this term in Gibbons v. Brandt, 170 F.2d 385, 387 (7th Cir. 1947), "It is to be determined always by its context, and it has been held to mean real estate or buildings, or both." In the present situation, section 114 gives the Administrator a right of entry which is essentially an exemption from trespass laws. The legislative history would suggest a broad reading of that exemption or right, wherever necessary to effectuate the purposes of section 114.

2. The owner or operator of an emission source may try to restrict the area subject to the Administrator's right of entry by erecting a fence next to the emission source and declaring the rest of his land not to be the same "premises." There is no reason to conclude that §114 is so narrow as to permit such a ploy. If the Administrator's purpose in entering the land adjoining the fenced-off source were one of the purposes envisioned by Congress in granting him the right of entry, then common ownership of the adjoining tract should make it the same "premises."

§ § § § § § §

TITLE: Ambient Air Quality Monitoring by EPA

DATE: September 28, 1972

MEMORANDUM OF LAW

FACTS

Your memorandum of September 12, 1972, informs us that the Standards Development and Implementation Division is initiating an air quality sampling program around a number of smelters for which emission regulations were proposed by EPA on July 27, 1972. Potential sites for locating monitoring equipment were based on diffusion model predictions. Some of these sites are on land owned by the smelters, e.g., at Kennecott Copper's Utah Smelter. The monitoring equipment at each of the sites would be operated by EPA personnel.

QUESTION #1

What is the meaning of the phrase "to which the general public has access" in EPA's definition of "ambient air"?

ANSWER #1

We believe that the quoted phrase is most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering.

QUESTION #2

Should a different definition of "ambient air" be made for primary versus secondary standards since secondary standards involve welfare and not the health of persons?

ANSWER #2

EPA's regulation defining "ambient air" makes no such distinction, and we find a suggestion in the Act that Congress intended such a distinction.

QUESTION #3

What type of approval from smelter officials is necessary in order to operate sampling equipment on smelter property?

ANSWER #3
Informal, oral permission is acceptable.

DISCUSSION

1. EPA's regulations prescribing national primary and secondary ambient air quality standards define "ambient air" to mean "that portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR 50.1(e). That definition, in our view, limits the standards' applicability to the atmosphere outside the fence line, since "access" is the ability to enter. */ In other words, areas of private property to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property.

2. In our telephone conversation, you have pointed out that this conclusion enables the property owner to determine what constitutes "ambient air" since he may fence his property and thereby preclude public access. This result may indicate that a property line boundary rather than a fence line boundary for ambient air makes better sense. Two factors dictate that this interpretation not be adopted: 1) the ordinary meaning of "access" includes the right or the ability to enter (see footnote below); 2) any definition which limits the scope of applicability of ambient air quality standards must be examined in the light of §107 of the Clean Air Act. That section provides that "Each State shall have the primary responsibility for assuring air quality within the entire geographic area compromising such State..." (emphasis added). In our view, a definition of "ambient air" that excepts fenced private property (or public lands) from the applicability of the Act is probably inconsistent with the quoted statutory language; expanding the exception beyond its current limits is clearly not legally supportable.

3. An argument can be made that the existing 40 CFR 50.1(e) is not inconsistent with §107 of the Act insofar as primary standards are concerned, because those standards are concerned with public health and the definition is directed at the general public's exposure to risks. This argument does not apply, however, in the case of secondary standards, which are to protect against adverse effects on "...soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate" and "damage to and deterioration of property...as well as effects on economic values and on personal comfort and well-being". Even assuming for the sake of argument that any of the tangible things in the quoted list may be harmed by air pollution without contravening the law if they are upon fenced private property, it is highly unlikely that adverse effects upon weather, visibility, and climate can be so restricted. In addition, it is clear that despoilation of the landscape may affect the personal well-being of many individuals in the psychic sense, even if some sort of barrier separates them from the despoilation.

4. If any problems arise regarding the activities of Federal employees upon provate lands, please contact me and I will confer with our Grants and Procurement Division.

---

*/ Webster's Third New International Dictionary (1966) defines "access" to mean "Permission, liberty, or ability to enter".

MOBILE SOURCES

TITLE: New or Restored Engines in Old or Restored Vehicles (§213)

DATE: January 14, 1972

FACTS

Kern Industries of Ayer, Massachusetts restores pre-1950 Citroen automobiles. The original body and mechanical equipment are utilized except that a new 1971/72 2.1 litre Citroen engine will be installed. Kern represents that space limitations prevent installation of the pollution control equipment which is a part of the new engines installed by Citroen in their 1972 models. Mr. Kern has asked for a waiver for these engines from the provisions of the Clean Air Act.

QUESTION # 1

May 1971 and 1972 model year motor vehicle engines which are not equipped to meet EPA emission standards be imported into the United States?

QUESTION #2

Is a restored body-chassis powered by a 1971/72 engine which has not previously been used subject to EPA emission control regulations applicable to light duty motor vehicles and, therefore, required to be covered by a certificate of conformity?

ANSWER #1

The 1971 model year motor vehicle engines may not be imported into the United States unless they are covered by a certificate of conformity with Federal emission standards for that year, or are conditionally admitted pending certification. The 1972 model year engines may be imported under a declaration that they are not subject to the Clean Air Act and Federal motor vehicle emission control regulations.

ANSWER #2

The chassis-body-engine combination constitutes a "new motor vehicle" within the meaning of §213(3) of the Clean Air Act, and is subject to the standards and certification requirement of 45 CFR Part 85.

DISCUSSION

1. Section 202 of the Clean Air Act authorizes the Administrator to regulate emissions from new motor vehicle engines. Emission standards were in effect for light duty motor vehicle engines in model year 1971, but were deleted for 1972. since §213(3) provides that imported engines shall be considered "new" if they were manufactured during a model year for which engine emission standards were in effect, 1971 model year engines are "new" but 1972 engines are not. Generally speaking, a "new" engine must be covered by a certificate of conformity with Federal emission standards or its importation is prohibited by §203(a)(1) of the Act. There are special entry procedures under joint

Bureau of Customs EPA regulations (19 CFR 12.73) which provide for importation under bond pending certification. An engine which is not new may be imported under a declaration that it is not subject to the Act or regulations thereunder.

2. Irrespective of how the engines are imported, the chassis-body-engine combination which Kern proposes to manufacture will be a new motor vehicle within the meaning of the Clean Air Act, and subject to EPA's emission control regulations. It is clearly a "motor vehicle", since that term is defined in §213(2) as "any self-propelled vehicle designed for transporting persons or property on a street or highway" [emphasis added], and the propulsion referred to is obviously that supplied by some engine. Accordingly, Kern may not successfully argue that EPA is compelled to evaluate the applicability of the standards on the basis of the vehicle (body-chassis) or the engine separately.

3. The provisions of Title II of the Act apply generally to any new motor vehicle, which is defined in §213(3) as ".... a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; ...". In this case, the title to the vehicle consisting of a pre-1950 Citroen body-chassis combination and a 1971/72 Citroen engine has never been transferred to an ultimate purchaser, and therefore, it is a "new motor vehicle" within the meaning of §213(3). This result is consistent with the congressional intent, which was to make the emission regulations apply to new sources of pollutants. Clearly, this vehicle powered by a recently manufactured engine is not an existing pollutant source. It has all the basic characteristics associated with any other new automobile just off the assembly lines, despite the fact that it is novel.

4. Since Kern Industries is a person "engaged in the manufacturing or assembling of a new motor vehicles", i.e., they are in that business, they are a "manufacturer" within the meaning of §213(1) of the Act. Kern must obtain a certificate of conformity for these vehicles, unless MSPC determines that they are covered by the certificate issued to Citroen.

§ § § § § § §

TITLE: Replacement Engines for Installation in Vehicles of Prior Model Years

DATE: April 27, 1971

FACTS

General Motors manufactures partial engines (short blocks) to provide replacement engines for vehicles manufactured in prior model years. The short blocks are not used in new motor vehicles. These partial engines are built to the specifications of the prior model year involved, but they do not include carburators, electrical equipment, or intake or exhaust manifolds. Presumably, these components are installed by General Motors dealers or other dealers, independent garages, or the vehicle owner. General Motors has asked for a determination that they are not required to obtain certificates of conformity for short blocks.

QUESTIONS

Are short blocks subject to motor vehicle engine emission standards promulgated under Section 202 of the Clean Air Act?

ANSWER

Short blocks are not "motor vehicle engines" within the meaning of the Clean Air Act and, therefore, are not subject to emission standards promulgated under the Act. Accordingly, no certification of conformity under Section 206 of the Act is required for such partial engines.

DISCUSSION

The Clean Air Act does not expressly define "motor vehicle engines," but it does make them subject to emission standards. Section 213(2) of the Act defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." It is our opinion that the quoted definition by implication defines "motor vehicle engine" to mean any engine which is capable of propelling a "motor vehicle." As manufactured, the short block is not capable of being utilized to propel a vehicle. This limitation compels the determination that short blocks are not subject to the Act.

In our view, the short block should be considered as a part (or parts) which will be used in the replacement market only, just as carburetors, distributors, and other replacement parts. Where a manufacturer produces a complete engine for the replacement market, it is subject to the emission standards applicable to the model year engines it is intended to replace, and, if manufactured to the specifications of those engines, it would be covered by the certificate of those engines, it would be covered by the certificate of conformity issued for those engines. If it is not manufactured to the specifications of a certified engine, separate certification would be required.

§ § § § § § §

EMISSION CONTROL SYSTEMS

TITLE: Modification of Emission Control Systems or Devices

DATE: May 28, 1971

FACTS

In connection with your office's proposed set of regulations on modifications to motor vehicle emission control systems or devices, we have recently sent you a memorandum of law which attempted to define the scope of the Administrator's authority under the Clean Air Act to grant exemptions from section 203(a)(3). As you know, that section prohibits any motor vehicle manufacturer or dealer from intentionally removing or rendering inoperative any motor vehicle emission control device or system installed in compliance with Federal emission standards promulgated under section 202 of the Act. Our further discussions with OAP's Ypsilanti staff concerning the proposals of Cummins Engine Corporation, and others to have their dealers modify certified engine configurations1/ have indicated a need for further examination of the engine modification issue and section 203(a)(3) in a broader context than we dealt with in our earlier memorandum.

QUESTION

Does section 203(a)(3) of the Clean Air Act prohibit all modifications by manufacturers and dealers to certified configurations of motor vehicle emission control systems or devices, or does the section allow the Administrator to review proposed modifications and approve those which do not impair the emission control performance of the vehicle or engine as manufactured?

ANSWER

Section 203(a)(3) may be interpreted as allowing the Administrator to evaluate and approve emission control system or device modifications which he determines do not impair the ability of the vehicle or engine involved to conform with applicable Federal emission standards for the lifetime of such vehicle or engine. This determination would require the Administrator to review such test data and/or specifications as he deems necessary for a sound engineering judgment.

DISCUSSION

Section 203(a)(3) was obviously intended to prevent tampering with emission control systems or devices. We do not believe, however, that it is reasonable to interpret the section as creating an obstacle to the development of emission control equipment for installation on 1968 and subsequent model year vehicles, which is more effective than the devices or systems which were

---

1/ These modifications would be to vehicles which are already in the hands of ultimate purchasers.

originally installed. Installation of this improved equipment will in many cases, we assume, involve the removal or rendering inoperative of the original control devices or systems. Where the Administrator determines that a proposed substitution or modification of control equipment will not result in emissions in excess of the applicable standards, we conclude that such substitution or modification does not involve a removing or rendering inoperative within the meaning of section 203(a)(3) and is therefore not prohibited.

Beginning with the 1972 model year, new motor vehicles and new motor vehicles engines subject to Federal emission standards will be warranted to be ---

> "(1) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 202, and (2) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under sec. 202(d))"[2]

Logically, these requirements which the Congress has applied to vehicles and engines as originally equipped should also be applied by the Administrator to any equipment which he approves as a modification to or substitution for the original equipment. Accordingly, the regulations should require, as a precondition to approval, assurances that the manufacturer will warrant the equipment installed in modifying the emission controls in accordance with the requirements in section 207(a), with any appropriate modifications. At such time as a performance warranty under section 207(b) becomes applicable, the regulations should be amended to apply that warranty to modified vehicles and engines.

The recall provisions of section 207(c) would also appear to be applicable to vehicles and engines as modified, within the useful life of the vehicle or engine itself. The manufacturer must be required to provide to the ultimate purchaser written instructions for the maintenance reasonable and necessary to assure proper functioning of the vehicle's emission control equipment, as modified, to the extent such maintenance varies from that prescribed for the vehicle as sold originally. This follows, since the manufacturer's responsibilities under the recall and performance warranty provisions both depend upon proper use and maintenance. Finally, the labeling requirement of section 207(c)(3) and 45 CFR 120114 must be satisfied. Any modification which renders the information on the label inaccurate will necessitate the substitution of a correct label or installation of an additional label which provides the pertinent information to the owner and the mechanic.

We considered whether section 203(c) indicated a Congressional intent that only modifications within its limited scope should be permitted, and conclude that the section does not preclude the Administrator from evaluating and approving other types of proposed changes in emission control devices or systems.

Since, as our answer here and in the memorandum regarding section 203(c) state, the critical test of any modification is whether, in the Administrator's opinion, it precludes continued compliance with the emission standards for the useful life of the vehicle or engine, the Administrator must obtain sufficient information to enable him to make a determination regarding continuing compliance. We think that the format and the information requirements of the regulations on modifications which you have submitted for our review are appropriate for this purpose.

---

[2] Section 207(a) of the Clean Air Act, as amended.

§ § § § § § §

TITLE: Lead Emissions from Motor Vehicle Exhaust (Sections 202, 211, 110)

DATE: October 10, 1973

Bob Ryan's memorandum of September 27 requests that OEGC provide answers to two questions posed by Senator Randolph regarding EPA's authority under the Clean Air Act to deal with lead emissions from motor vehicle exhaust. The questions are set forth and answered below.

QUESTION #1

Does the Agency have the authority to impose a particulate or lead emission standard for new vehicles under section 202 of the Clean Air Act which would require use of a particulate trap rather than unleaded fuel?

ANSWER #1

Yes. The language of section 202(a) is clearly broad enough to authorize such a standard, assuming the required finding with respect to endangerment of public health or welfare is made. The section specifically allows the Administrator to regulate "the emission of any air pollutant" (emphasis added), and there is no implied limitation, in our view, to pollutants which do not result from the use of an additive. In addition, before regulating fuel composition or additive use under section 211(c) of the Act, the Administrator must consider the economic and technological feasibility of achieving the desired health or welfare protection by using new motor vehicle emission standards.

QUESTION #2

Does the Agency have the authority to require retro-fitting of old vehicles with particulate traps?

ANSWER #2

There is no authority in Title II of the Act to regulate emissions from motor vehicles which are not new. Specifically, section 202 is limited by its terms to new motor vehicles and engines.

If, under Title I of the Act (§110), the Administrator determined that control of particulate matter emissions from vehicles in use were necessary to assure attainment of a national ambient air quality standard for that pollutant, we believe that sections 110(a)(2)(B) and 110(c) would authorize prescribing emission standards requiring use of reasonably available controls.

TITLE: Trade Secret Information and Suspension of the 1975 Auto Emission Standards (Section 202(B)(5))

DATE: February 15, 1972

QUESTION

In the course of deciding whether to grant a one-year suspension of the 1975 new motor vehicle emission standards pursuant to section 202(b)(5) of the Clean Air Act, is the Administrator authorized to release to the public any information which has been submitted by the auto manufacturers in support of their application for suspension (even though such information may include trade secrets) or is he required to keep trade secret information confidential?

ANSWER

So long as the Administrator weighs the public interest favoring disclosure against the private interest favoring secrecy and relies upon substantial evidence, rather than upon a per se rule requiring disclosure, he is authorized to disclose to the public any information upon which he may rely in deciding whether to grant a suspension.

DISCUSSION

1. This memorandum supplements my memo of February 7, 1972, in which I concluded that the Administrator is authorized--and perhaps even required -- to disclose to the public any information (including trade secrets) upon which he may rely in deciding whether to grant a one-year suspension of the 1975 auto emission standards. At footnote 8 of his earlier memo Mr. Schwartz indicated that he was unable to discover any cases directly on point in the course of a brief search for precedents. Additional research has yielded two cases which are closely analogous to the suspension problem and which confirm the earlier conclusion with a slight qualification.

2. In *F.C.C.* v. *Schreiber*, 381 U.S. 279, 85 S. Ct. 1459 (1965), the Commission subpoenaed certain records from Music Corporation of America (MCA) in connection with public hearings investigating the practices in television programming. MCA refused to submit the subpoenaed records, partly on the ground that the Commission had refused to agree to treat certain "trade secrets and confidential data" as confidential. The Supreme Court ordered MCA to comply with the subpoena and upheld the Commission's decision to make public the subpoenaed information. The Court found that such a decision was not an abuse of discretion. 381 U.S. at 288.

3. In reaching this conclusion, the Court pointed out that the Commission had applied a balancing test in deciding whether to make public the information in question. The Commission determined that "'public proceedings should be the rule' with exceptions granted 'only in those extraordinary instances where disclosure would irreparably damage private, competitive interests *and* where such interests could be found by the Presiding Officer to outweigh the paramount interests of the public and the Commission in ful public disclosure.'" *Id.* at 293. [emphasis added]. The importance of this balancing test is under-

scored by the Court's dictim that "The only...possible basis for [finding an abuse of discretion by the Commision] would be the assumption that the Presiding Officer would consistently require disclosure even if a balancing of public and private interests compelled secrecy." Id. at 296.

4. While this dicta in Schreiber would prohibit a per se rule requiring disclosure of all information in all circumstances, the presumption in favor of public disclosure "accords with the general policy favoring disclosure of administrative agency proceedings." Id. at 293. The reasons which support disclosure were outlined by the Court (and would apply equally to disclosure of trade secret information in the course of the suspension proceedings under the Clean Air Act). First, such disclosure enables other involved groups and individuals to "supplement the record from their own diverse points of view" thereby "stimulating the flow of information" to the Commission. Second, public hearings, by involving the concerned public in the proceedings, provide "a practical inducement to public acceptance of the results of the investigation." Third, publicity stimulates the flow of "public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action." Fourth, public disclosure is "necessary to the execution of its duty...to make annual reports to Congress." Id. at 294-5.

5. These considerations weight the balance heavily in favor of public disclosure. However, if compelling evidence is presented that certain information would destroy a company's competitive position, if disclosed, a careful balancing of public and private interests is required to sustain administrative action present willingness to share information on new developments in pollution control technology, it may be difficult for most companies to prove that disclosure of any relevant information would result in such irreparable harm as to outweigh the pubic interest in disclosure.

6. The other case which appears to be on point in American Sumatra Tobacco Corp. v. SEC, 110 F. 2d 117 (D.C. Cir. 1940). That case upheld the Securities Exchange Commission in its decision to disclose parts of petitioner's profit and loss statement, notwithstanding petitioner's request for confidential treatment of such information. As in Schreiber, the Court interpreted the basic authorizing legislation as requiring a weighing of public and private interests in deciding whether to disclose. Also as in Schreiber, the Court suggested the impermissibility of a per se rule requiring disclosure. "In this case the Commission has not justified its position on the ground of a general rule or policy. If it had, the case would have been different and would have demanded different treatment." Id. at 121. However, finding that the commission's decision to disclose "rests on substantial evidence and on inferences which are not arbitrary and capricious", the Court sustained the Commission. In doing so, the Court recognized that in the course of balancing public and private interests "the possibility of incidental loss to the individual is sometimes unavoidable."

§ § § § § § §

TITLE: Warranty Repairs on Emission Control Systems

DATE: November 22, 1972

MEMORANDUM OF LAW

FACTS

Automobile manufacturers currently require in their 12-month/12,000 mile warranties that warranty repair work must be performed by the manufacturer's authorized dealer with original equipment parts. 1/ One manufacturer interviewed on this subject states that this requirement is a reasonable provision of the contractual warranty entered into between it and the buyer2/, since maintenance covered by warranty is paid for by the manufacturer and it should therefore be able to specify who does the work, to guide and supervise the work, and to prescribe the parts to be used (its own).

The requirement on repairs covered by warranty is extended by the manufacturers to the Clean Air Act's five-year/50,000 mile defect warranties on emission control (§207(a)(2)). Presumably, when manufacturers are required under §207(b) of the Act to warrant the emission control performance of their vehicles for their useful life, the manufacturers will require that repairs covered by the warranty be performed by authorized dealers using original equipment parts.

QUESTION

Does the Clean Air Act prohibit light duty motor vehicle manufacturers from prescribing that repairs on emission control related systems or components performed under a §207(a)(2) or §207(b) warranty must be performed by an authorized dealer and/or with original equipment parts?

ANSWER

No such prohibition is expressed in the Act, and there appears to be no basis for finding that such a prohibition is necessarily implied. Section 207(b) includes language indicating that the manufacturers would be required to perform the repairs under that warranty.

DISCUSSION

1. Since the warranties imposed by the Act are not contractual undertakings between the manufacturer and the purchaser, the relevant question is whether the warranty repair requirement, unilaterally super-imposed by the manufacturer upon action taken by Congress, is consistent with the legislative purpose. 3/ We think it is incumbent upon EPA as the agency responsible for

---

1/ This requirement is not applied to routine preventive maintenance or other maintenance.

2/ The unequal bargaining position of the parties involved indicates that the terms of the sale are dictated by the manufacturer rather than an agreed to by the parties.

3/ Conditions inconsistent with provisions of the Act would be in violation of §203(a)(4)(A), since they would constitute failure to provide the required warranty to the purchaser.

administering the Act to assess whether this requirement may have the effect of diminishing the value of the §207(a)(2) or §207(b) warranty to the vehicle owner and/or to motor vehicle emission control. Stated simply, the congressional intent in §207 was that (1) the manufacturer should have a distinct incentive to build vehicles so that they could conform with applicable standards during the period of their maximum usage, and (2) the consumer should get the emission control he paid for. This was accomplished by requiring the manufacturers to make good on defective parts and workmanship, to restore to compliance individual vehicles found to be in violation of the standards, and to recall and repair vehicles in a class found to violate the standards.

2. The primary intent and effect of the manufacturer's warranty repair requirement is to guarantee the manufacturer and his dealers a captive market in certain repairs and replacements related to emission control. While the requirement may have significant impact upon competition in the automobile repair and replacement parts industries4/, it may be proven to be beneficial for automotive emission control. This would follow because manufacturer's dealers would likely be best informed on how to make necessary repairs and parts replacements, and original equipment parts, which are presumably identical to the parts used in certified test vehicles, would be most capable of performing in compliance with the standards.

3. There appears to be express congressional recognition that the manufacturer should be directly responsible for correcting vehicle noncompliance under the §207(b) performance warranty. Section 207(b)(2) states that the warranty must provide that the manufacturer "... shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer". While it is arguable that the manufacturer could in effect "remedy" a nonconformity merely by reimbursing an independent garage which performed warranteed repairs, the quoted language may at the very least be read as a recognition of accepted practice under warranties. We make no attempt to assess the significance of the absence of the quoted language in §207(a)(2).

4. EPA must be mindful of the manufacturers' limited capability to perform more than a relatively small percentage of the nation's automotive maintenance through their dealers and the deterent effect this limited capability could have on claims by owners under the §207 warranties. If, for example, EPA determines in 1977 that the manufacturers are in effect negating the availability of the warranty repairs by forcing owners to obtain repairs through dealer networks which are not equal to the task, Agency action to preserve the viability of the warranty may be justified.

5. Finally, we wish to caution that a different conclusion than that expressed in this memorandum may be appropriate in a situation in which repairs or replacement covered by §207 warranties are also scheduled maintenance under §207(c)(3). In particular, the anti-competitive aspect of the manufacturers' requirement would be far more substantial in that situation.

4/ Our information is that the Justice Department and the Federal Trade Commission have not objected to the manufacturer's requirement as applied to their contractual warranties.

TITLE: Replacement of Catalytic Converters

DATE: June 27, 1972

MEMORANDUM OF LAW

FACTS

In connection with his determination not to suspend for one year the effective date of the hydrocarbon and carbon monoxide emission standards applicable to 1975 model year light duty motor vehicles (page 8 of the decision), the Administrator concluded that the necessity of replacing a catalytic emission control device at approximately half-way through a vehicle's useful life does not preclude his determining that such devices constitute "effective" technology to meet the standards. Responding to questioning on this determination before the Senate Air and Water Pollution Subcommittee (Sen. Eagleton), the Administrator stated that the Agency was researching its authority on the question of whether it could require the replacement cost to be included in the original price of the vehicle. Senator Eagleton and the Administrator agreed that if this requirement were imposed, vehicle owners would have an incentive to obtain the necessary catalyst replacement, rather than be faced with the disincentive of having to pay for the replacement as a maintenance or repair item.

QUESTION

Does the Clean Air Act authorize the Administrator to require motor vehicle manufacturers to include the cost of replacement of the catalytic emission control device in the purchase price of 1975 and later model year vehicles?

ANSWER

The Administrator may, pursuant to §206(a), impose as a term of a manufacturer's certificate of conformity the requirement that the manufacturer provide to the ultimate or subsequent purchaser of the vehicle a replacement catalyst at no cost to the purchaser, other than any replacement cost which may be included in the vehicle's original selling price.

DISCUSSION

1. Section 206(a) of the Act provides that the Administrator shall issue a certificate of conformity to a motor vehicle manufacturer with respect to any new motor vehicle which he determines complies with applicable emission control regulation for its useful life. The section expressly provides that the Administrator shall issue the certificate "upon such terms... as he may prescribe", but neither the Act nor the relevant legislative history1/ provides guidance as to the nature of terms which may be imposed by the Administrator. We conclude as a general proposition that the content of such terms is discretionary

---

1/ Section 206(a) was first enacted as part of the 1965 amendments to the Clean Air Act (P.L. 89-272), and was amended in 1970 (P.L. 91-604).

with the Administrator, provided that they are reasonably related to carrying out the Congressional purpose in the Act. That purpose, in §206(a), is to enable the Administrator to determine, through the testing of prototype vehicles, that production vehicles represented by those prototypes will conform with the applicable emission standards for 50,000 miles or five years. 2/

2. Where prototype test vehicles require replacement of a catalytic control device during 50,000 mileage accumulation in order to demonstrate conformity, it is clearly within the Administrator's discretion to require as a condition of the pertinent certificate that the manufacturer provide for the replacement of that device on production vehicles at the mileage point indicated by the test vehicles. To "provide for the replacement" could reasonably be specified to mean at no charge to the owner (apart from any replacement costs included in the purchase price of the vehicles) since the well-recognized resistance of vehicle owners to paying for maintenance or repairs not directly related to driveability problems would likely render ineffective a replacement program involving out-of-pocket expense at the time of replacement.

3. The subject of conditioning certificates of conformity has been dealt with in the motor vehicle emission control regulations since they were first promulgated in 1966. This language of §85.55(a)(2) is precisely in point:

> Such certificate will be issued for such period not more than 1 year as the Administrator may determine and upon such terms as he may deem necessary to assure that any new motor vehicle covered by the certificate will meet the requirements of these regulations relating to durability and performance.

4. A point which should be considered is that the imposition of the condition discussed above could have a severe anti-competitive effect in the muffler replacement market, because presumably only the manufacturers' dealers would be involved in the replacement programs. Also of interest is the possible economic windfall which could accrue to manufacturers if owners who pay for catalytic converter replacement when they purchase a vehicle do not actually obtain replacement.

2/ It is clear that Part A of Title II contemplates that the manufacturer is to be responsible for the compliance of each vehicle for its useful life, so long as it is properly maintained by the ultimate or subsequent purchaser.

§ § § § § § §

TITLE: Sulfuric Acid Particle Emissions from Vehicles Equipped with Platinum Catalysts

DATE: October 25, 1973

FACTS

In a letter to you of September 25, 1973, Ford Motor Company raised the problem of sulfuric acid particle emissions from vehicles equipped with platinum catalysts. They cite in particular 40 CFR §85.004(b)(1)(i) of the motor vehicle certification regulations which prescribes the use of any control system which ". . . in its operation or function cause the emission into the ambient air of any noxious or toxic substance that would not be emitted in the operation of such vehicle without such system, except as specifically permitted by regulation." Ford and the other manufacturers need to know EPA's interpretation and application of this language since they are about to begin certification testing of 1975 model year vehicles equipped with catalysts.

In order to identify the origin of the provision, you and I called Mr. Don Jensen, now with Ford, who was with the California Air Resources Board when it first adopted and implemented its emission control device certification regulations. Mr. Jensen confirmed suspicions that the California regulations had contained the substance of the provision, and described briefly how it had been administered. California's approach was, with respect to catalytic devices under consideration, to have a physician from the manufacturer meet with a physician from the Board and if they agreed that no emissions would be given off by the device of a nature and in sufficient amounts to endanger health, the requirement of the section was satisfied. No determinations adverse to a manufacturer were made on the few devices certified by the State.

Dr. Greenfield's recent memorandum on the catalysts emissions issues identifies platinum and palladium compounds as other possible emissions from platinum catalysts.

QUESTION

What is the proper interpretation of 40 CFR §85.004(b) with respect to its application to the emissions resulting from the use of platinum catalysts?

ANSWER

In general, the provision requires manufacturers to test during the certification stages to identify the compounds emitted by devices and gives notice to manufacturers that they may be subjected to emission standards prescribed on an emergency basis when the Administrator determines that a device will emit a compound of a nature and in sufficient quantities to endanger public health. There may exist substances so extremely noxious in very minute concentrations that prudence would dictate that their emission be absolutely prohibited, and in such a situation we take the view that the section would authorize the withholding of certification based upon a determination by the Administrator of this highly noxious character.

DISCUSSION

The essence of the provision is that it is, as you have characterized it, in your October 10 memo, a "catchall"; it was intended to cover substances for which we have not prescribed standards and test procedures. Express authority for the provision can be best be found in §202(a) of the Act, which allows the Administrator to prescribe motor vehicle emission standards for any air pollutant which "in his judgement causes or contributes to, or is likely to cause or contribute to, air pollution which endangers the public health or welfare". The provision departs from the usual approach, however, in that the judgment required by the section is made in a general fashion only; a finding specific to a given substance is deferred until information which could serve as basis for the finding is before the Agency. While this approach admittedly presents a rather vaguely defined standard to guide the manufacturer, we think it is legally defensible in view of the constraints identified below under which we believe it must be administered.

Section 301(a), the Act's general rulemaking authorization for the Administrator to "carry out his functions" may also provide a basis for prescribing the provision. 1/ Certainly it is a proper function for the Administrator to attempt to insure that his regulatory efforts to protect health do not create greater or equal endangerments than those which they cure. Whether §202(a) or §301(a) is principally relied upon appears to make little difference in practice, however, since in the case of most noxious substances we believe that the Agency is required to engage in rulemaking beyond §85.004(b) in order to legally give effect to the policy expressed there.

The relevant language of 40 CFR §85.004(b)(1) is as follows:

> (b)(1) Any system installed on or incorporated in a new motor vehicle to enable such vehicle to conform to standards imposed by this subpart:
>
> (i) shall not in its operation or function cause the emission into the ambient air of any noxious or toxic substance that would not be emitted in the operation of such vehicle without such system, except as specifically permitted by regulation . . .
>
> (2) Every manufacturer of new motor vehicles subject to any of the standards imposed by this subpart shall, prior to taking any of the actions specified in section 203(a)(1) of the Act, test or cause to be tested motor vehicles in accordance with good engineering practice to ascertain that such test vehicles will meet the requirements of this section for the useful life of the vehicle.

The meanings of "noxious" and "toxic" must be considered to be their dictionary definition, "harmful to health", since no other definition is provided. Despite the fact that the manufacturer is required to test to ascertain emissions from the catalyst, he can be expected to make, at most, a preliminary judg-

---

1/ In fact, that is the section cited in the Federal Register document of March 30, 1966, which established it. The statement goes further to say that the regulations "interpret and apply" §202 and other sections.

ment as to the noxious character of a substance emitted.[2] For example, he could identify a substance having known carcinogenic properties. However, we believe that since the provision specifically refers to emissions into the ambient air, it must be read as covering substances which will be harmful to health in the concentrations in which they can be projected to exist in the ambient air. This is a judgment which can be made, both from the legal and factual standpoints, only by the Administrator. Only the Agency is in a position to know how many manufacturers will use a certain system and how many vehicles will use it. This information is necessary to the determination of noxiousness in all cases except perhaps those where the substance is so extremely toxic that there would be general agreement that any emissions ought to be prevented.

What the above leads to is the conclusion that the Administrator cannot usually merely make a determination that a substance is inherently noxious, but must determine what ambient concentrations of it are noxious, and what are the permissable emission levels to assure that ambient levels will not attain the noxious concentrations. In addition, he must identify a test procedure or procedures for measurement. That, in essence, is the §202(a) standard-setting procedure. Accordingly, it is our view that in order to effectuate §85.004(b) in most situations, the Administrator must set forth by regulation the permissable emissions for a vehicle and a test procedure for determining compliance with that limitation.[3] Like other regulations, this standard should be proposed, except that special considerations which would justify a finding of good cause for immediate effectiveness under the Administrative Procedure Act would allow promulgation without proposal.

Considerations of effective date raise the issue of lead time. Section 202(a) specifically addresses the lead time issue, requiring the Administrator to determine what time is necessary for developing and applying technology. We are of the view that this requirement must not be ignored even if the regulations are viewed as being founded on §301(a), since at the least the Administrator must make a determination based upon reasonable time. Because of the exceptional nature of the system-created pollutant, however, we believe that this determination may properly include consideration of the risk to health presented by the substance involved. That is, the risk of exposure from one model year's production of vehicles on the road may be acceptable to the Administrator, while two years' production may not. In this connection, we should note that the model year cut-offs need not determine the applicability of the special standards.

2/ There is a distinct timing problem involved in getting any of the test data to the Administrator, since the manufacturer need not report his data until submission of the Part II certification application (See §85.075-4(c), which now improperly references §85.075-1 instead of §85.004).

3/ This would almost certainly mean that the standard would not take effect until the model year following the one in which the problem is first identified. While this presents obvious difficulties, some relief could be obtained for the future by requiring §85.004(b) test results to be reported during the development phase of control system engineering.

Finally, a specific question that was raised was whether sulfuric acid emissions from catalysts could be dealt with under the provision if vehicles not equipped with such systems also emit that pollutant. The answer to this lies in the discussion above regarding the determination of noxiousness. Even though sulfuric acid emissions may have been present before, if the addition of the catalyst is the element that increases them to the point where they can be adjudged noxious, the provision may be applied.

§ § § § § § §

TITLE: Shipment of Uncertified Vehicles

DATE: July 1, 1971

MEMORANDUM OF LAW

FACTS

Due to a number of factors, including the lead time allowed for compliance with 1972 motor vehicle emission standards, many manufacturers will not complete their durability testing of vehicles until a very short time before they plan to introduce their 1972 line for sale. Since no certificate of conformity can be issued until such testing is completed and the results evaluated, and the law prohibits the introduction or delivery for introduction into commerce of vehicles unless covered by a certificate of conformity (Section 203(a)(1)), several manufacturers have stated that they will experience severe logistical problems. Specifically, even though the testing will not be completed, since the manufacturers are confident that the results will qualify the vehicles for certification, production of 72 model year vehicles will commence as it has in previous years. As is the usual practice, arrangements have been made by the manufacturers with the railroads and trucking companies to ship these vehicles to dealers as they come off the assembly line. This will be prior to the time the vehicles are covered by certificate of conformity. Manufacturers do not have facilities for the storage at the plants for the large number of vehicles which they produce.

QUESTION

Pursuant to the Clean Air Act and its implementing regulations, is there a method by which manufacturers, without transferring title to vehicles, can ship vehicles to dealers solely for the purpose of storage at the dealers' premises, without violating the prohibited Acts set forth in §203 of the law?

ANSWER

Section 85.91 of the regulations provides a legal basis on which the Administrator may issue a limited certificate of conformity, permitting such shipment, provided 1) technical judgments as to the likelihood of compliance can be made, and 2) appropriate steps are taken to preclude the transfer of title from the manufacturers to dealers or other persons.

DISCUSSION

Section 302(a)(1) prohibits, with respect to a new motor vehicle, the selling, offering for sale, "... the introduction or delivery for introduction into commerce, . . . unless such vehicle . . . is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part . . . ." (§312 (b)). This meaning is in accord with established judicial definitions of the term.

While a weak argument could be made that the prohibition against introduction into commerce may be read as meaning introduction into commerce for purposes of sale, we do not believe that this contention can be sustained. Not only is it contrary to the usual concept of "introduction into commerce", but the prohibited acts are rather clearly intended to specifically cover those acts associated with the sale of vehicles. Accordingly, vehicles may not be shipped, even for the purpose of storage, unless covered by a certificate of conformity.

The certificate of conformity referred to in the preceeding paragraph is issued by the Administrator pursuant to Section 206(a)(1), if after testing, etc., he determines that vehicles submitted by a manufacturer conform with the regulations prescribed under Section 202 of this Act. The certificate may be issued "upon such terms, and for such period (not in excess of one year)," as the Administrator may prescribe.

Section 202 of the Act contains the general authority to issue emission regulations applicable to new cars. Under this Section, EPA has issued the standards and the test procedures by which compliance is determined. The test procedure include the requirement that certain vehicles of each type be run for 50,000 miles to determine the extent of deterioration; i.e., the extent to which emissions increase over the useful life of the vehicle. Once these tests are completed a "deterioration factor" is established, which can then be applied to other vehicles of the same type, which may be run only 4,000 miles. Under normal circumstances, a certificate of conformity cannot be issued until the completion of the durability tests and the application of the deterioration factor to the 4,000 mile test results from the required number of vehicles of the same type.

As background for what follows, it should be understood that in the past, on a few occasions, the Agency has issued to manufacturers "conditional certificates of conformity" which have allowed not only the shipment, but the sale of vehicles, prior to the time the durability vehicle mileage accumulation was completed. In all of these situations there was some extraordinary factor which prompted both the request for such a certificate and its issuance. (For example, a durability vehicle had been destroyed after accumulating 45,000 miles.) Without going into an analysis of the legality of the prior issuance of conditional certificates, it must be understood that in each case where such a certificate was granted the program was advised by this office that issuance could only be considered if, on the basis of emission data and durability (deterioration) data possessed by the program, a sound engineering judgment could be made that the cars would comply with the standards when testing was completed. When the program made this determination, these certificates were issued, (with the concurrence of the Office of General Counsel) despite the fact that the applicable regulations contained no authorization for their issuance.

The regulations under Section 202 of the Act with which we are now concerned contain one provision, not in previous regulations, which may provide legal support for the issuance of the conditional certificate. Section 85.91(b) of the regulations provides "each durability data vehicle shall be driven . . . for 50,000 miles or such lesser distance as the Secretary may agree to as meeting the objectives of this procedure." (Emphasis added) Clearly, this paragraph authorizes the Administrator to issue a certificate of conformity to manufacturers who have run vehicles less than 50,000 miles if he is satisfied that vehicles of that type will remain in compliance with the standards for their useful life. Since the Administrator could legally issue an unqualified certificate of conformity to manufacturers who had not run the full 50,000 mile test, without requiring the completion of the tests, we believe the Section offers a basis for issuing a limited certificate to manufacturers who have not completed the required testing. Again, the crucial factor is the judgment by the Administrator that, based on data available to him when the limited certificate is issued, the vehicles will comply when the tests are completed.

While we can supply legal support for this approach, the policy problems, and their effect on the legal basis for action must be considered. The obvious questions that the issuance of the limited certificate will engender is, if the Administrator has determined that the cars will conform, why require the manufacturers to accumulate the full 50,000 miles rather than simply issue the unconditional certificate at this time? While there is no good answer to this question, we may be able to respond that, despite, the Administrator's determination that the vehicles would comply, the manufacturers have not requested that they be excused from further tests, there is no compelling reason to excuse them from finishing the tests and that while we are confident the additional data will not disqualify the vehicles, the additional data may be useful. We would probably have to candidly state that this unusual procedure is, in part, due to the delay on the part of DHEW in promulgating the standards and test procedures too late for the manufacturers to complete their tests in time to avoid the present situation. Moreover, the precautions taken by EPA to insure that the vehicles are not, in fact, operated until certified, effectively accomplishes the purpose of the Act. Without going further into the matter, this may eventually lead to the assertion by interested parties that EPA has acted improperly, since with full knowledge of the situation that they were creating, the manufacturers refused to change their plans for producing, shipping and introducing 72 model year vehicles in late 71 rather than adjusting their arrangements to the requirements of the law.

A difficult question which EPA must be prepared to answer is this: once the manufacturers have shipped these cars, can we rely on results of tests which the manufacturers themselves are now performing, with the knowledge that unfavorable results will require them to gain possession of these vehicles from dealers throughout the United States.

Assuming that EPA desires to allow the shipment of vehicles, the only respectable legal approach is that our present information allows us to make the sound judgment that the cars will conform, and that we consider that the additional tests are necessary to validate our determination.

TITLE: Authority to Compel Auto Manufacturers to Conduct Tests

DATE: August 18, 1971

FACTS

This is in response to your oral request of July 28, 1971, for an opinion on the scope of the Administrator's authority to compel automobile manufacturers to conduct tests, the results of which EPA would use to develop effective compliance tests for production model motor vehicles. Specifically, the concern raised was whether manufacturers could be compelled by regulation to test production model vehicles to help determine whether any correlation exists between emissions of new motor vehicles at no or low-mileage and emissions of such vehicles at 4,000 miles. Your bureau has presented us with no information detailing the nature or extent of testing which would be compelled under the proposed regulation.

ISSUE

Is the Administrator authorized to require automobile manufacturers to conduct tests and report the results thereof in order to assist the Environmental Protection Agency in establishing an effective compliance testing program for production-model new motor vehicles pursuant to section 206(b) and (d) of the Act?

ANSWER

The Administrator is authorized to require automobile manufacturers to conduct tests and report the results thereof in order to assist EPA in establishing an effective compliance testing program for production-model new motor vehicles pursuant to section 206(b) and (d) of the Act.

DISCUSSION

1. Section 206(b)(1) of the Clean Air Act provides,

> In order to determine whether new motor vehicles are new motor vehicle engines being manufactured by a manufacturer do in fact conform with the regulations with respect to which the certificate of conformity was issued, the Administrator is authorized to test such vehicle or engines. Such tests may be conducted by the Administrator directly or, in accordance with conditions specified by the Administrator, by the manufacturer.

2. The Administrator's authority and duty to establish appropriate test procedure is further underscored by section 206(d): "The Administrator shall by regulation establish methods and procedures for making tests under this section."[1]

---

[1] See also Report No. 91-1146, June 3, 1970, p. 3: "The Administrator is authorized and directed to test, or require to be tested in such manner as he deems appropriate, any new motor vehicle or motor vehicle engine as it comes off the assembly-line in order to determine whether the vehicle or engine conforms with the applicable emission standards." [emphasis added]

3. The question raised in this memorandum is whether the Administrator is authorized to perform the functions imposed on him by section 206 by compelling automobile manufacturers to conduct testing to assist the Agency in determining the relationship between emissions at no or low-mileage accumulation and emissions at 4,000 miles. The Clean Air Act authorizes the Administrator to compel automobile manufacturers to conduct tests to obtain a certificate of conformity (section 206(a)(1)), to assist the Administrator in determining whether production-model new motor vehicles comply with regulations under section 202 (section 206(b)(1)) and with part A of Title II (section 208(a)), and to enable him to furnish information to the National Academy of Sciences (section 202(c)(4)(B)). However, the Act contains no express authority for the purpose of developing a production-model compliance test.

4. Since Congress provided no such express authority, it is arguable that Congress intended not to permit the Administrator to impose such a requirement on automobile manufacturers.[2] Furthermore, it is clear that Congress provided means by which the necessary test procedures and correlations could be developed - i.e., authority to conduct research, to make grant awards, and to enter into contracts under sections 103, 104(a)(2)(C), and 104(b). Therefore, it may be argued that Congress did not intend to permit the Administrator to require the manufacturers to perform such tests and that authority to do so may not be implied. Finally, in light of past practice and the authority contained in section 104(b) of the Act, the function of developing test procedures to gauge compliance may be viewed as a governmental function which was not intended to be shifted to the industry being regulated.

5. While these points are entitled to some weight, we are unable to find any expression of congressional intent to bar the Administrator from requiring manufacturers to perform testing for purposes other than those expressly authorized. Nor does the legislative history of the Clean Air Act support the view that government research, grants, and contracts were intended to be the exclusive means of developing assembly-line test procedures.

6. Furthermore, section 301(a) of the Act creates broad regulation-setting authority to enable the Administrator to perform his duties under the Act. The first sentence of that section provides,

> The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under the Act.

---

[2] But see American Trucking Association Inc. v. U.S., 344 U.S. 298, 309-10, 73 S. Ct. 307, 314 (1953):

> As a matter of principle, we might agree with appellant's contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. [citing cases] Its very absence, moreover, is precisely one of the reasons why regulatory agencies. . . are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

7. In our opinion, section 301(a) was intended as a grant of authority for the Administrator to exercise those powers necessary and proper to accomplish the ends mandated by the Clean Air Act. Similar language in other enabling legislation has been so construed by the Supreme Court. In American Trucking Association Inc. v. U.S., supra. at nt. 2, all nine members of the Supreme Court, including two dissenting Justices, agreed that language in the Interstate Commerce Act akin to section 301(a) "grants the Commission broad implied powers to carry out the general purposes of the Act." 344 U.S. at 323. In a different context, the Court also held that such general rule-making authority "may itself be an adequate source of authority... unless by express provision of the Act or by implication it has been withheld." Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111, 67 S. Ct. 1129, 1134 (1947).

8. It is true that in American Trucking "the problem which gave rise to the rules... was not in existence when Congress enacted the Motor Carrier Act" (Davis, Administrative Law, 1960, p. 39), whereas in this case, Congress was aware of the 0 mile-4,000 mile lack of correlation at the time of the legislation3/ yet did not expressly authorize the Administrator to require testing by manufacturers for this purpose. While Congress was aware of the problem, there is no indication in the legislative history of the Clean Air Act that Congress considered expressly authorizing (or prohibiting) the Administrator to solve the problem by requiring the manufacturers to assist in the conduct of research. We do not regard the factual difference between American Trucking and this situation to be so significant as to make inapplicable the holding of American Trucking - i.e., that general rule-making authority may be invoked even in the absence of express authority elsewhere in the Act.

9. The question remains, however, whether promulgation of a regulation requiring manufacturers to conduct tests to assist in the development of an assembly-line test is necessary and proper to enable the Administrator to fulfill his functions under section 206. Such a regulation may not be "necessary" in the sense that it would be the only alternative way of doing the requisite research. However, it is "necessary" in the sense in which that term is used in section 301(a) - i.e., it represents on alternative way which, if employed, would result in achievement of the stated objective. As Chief Justice Marshall wrote in the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 4 L.Ed. 579 (1819), which interpreted the word "necessary" in Article I, section 8, clause 18 of the U.S. Constitution:

> To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

3/ See comments of Rep. Farbstein, Congressional Record, June 10, 1970, H. 5357; Rep. Van Deerlin at H. 5372-3; and minority views of Reps. Van Deerlin, Ottlinger, and Tiernan, Report No. 91-1146, June 3, 1970, p. 52. In addition to these comments indicating Congressional concern that the 0 mile-4,000 mile lack of correlation required solution, see Report No. 91-1146, June3, 1970, p. 5: "While a start has been made in controlling air pollution since enactment of the Air Quality Act of 1967, progress has been regrettably slow. This has been due to a number of factors: ...(4) inadequacy of available test and control technologies..."

Since the regulation in question furthers the basic purpose of the statute, and in particular sections 206(b) and (d), it must be considered as "necessary" within the meaning of section 301(a). See also *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 355 F. 2d 255 (9th Cir. 1954).

10. Whether a regulation requiring reasonable testing by manufacturers to assist in the development of an assembly-line test is a proper exercise of the Administrator's rule-making power is the second part of the question. The basic principle of law which governs the determination of whether a rule is "proper" was stated in *Dixon* v. *U.S.*, 381 U.S. 68, 74, 85 S. Ct. 1301 (1965):

> The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law...but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which creates a rule out of harmony with the statute, is a mere nullity.

11. The problem, then, is whether the regulation under consideration would "carry into effect the will of Congress" or be "out of harmony with the statute." The problem is a difficult one, because in one sense the regulation is "out of harmony with the statute." Congress expressly permitted the Administrator to require manufacturers to conduct tests, but only for certain purposes. The regulation requires testing for purposes other than those specified.

12. Yet in another, broader sense, the regulation would carry out "the will of Congress as expressed by the statute" and be "in harmony" with it. Congress ordered the development of an assembly-line test procedure and program. It did so not merely for the purpose of section 206, but as a crucial link in an integrated regulatory scheme.

13. Attainment of the emission standards under section 202 can only be assured if production-model vehicles are tested. The validity of certificates of conformity issued under section 206(a) can only be verified by such tests. The warranty provisions of section 207, which are designed to insure that the emission standards will be met during the useful life of the vehicle, do not become effective until test procedures are developed with are "reasonably capable of being correlated with tests conducted under section 206(a)." (Section 207(b)) The entire automobile emissions standards program of Title II is inextricably related to the national ambient air quality standards and State implementation plans. These plans represent emission control efforts to complement Title II and to some extent must be based on what is achievable through regulation of automobile emissions. Thus, development of a production-model test procedure or failure to do so will "directly affect the regulatory scheme of the Act," just as was the case in *American Trucking Association Inc.* v. *U.S.*, supra. at nt. 2.

14. Although the establishment of test procedures and correlations between test results at varying mileage accumulation points is a governmental responsibility, requiring industry's aid in this efffort is no more improper than requiring the industry to conduct tests to assist in the determination of whether to grant a suspension under section 202(b) of the Act. In both cases, industry as well as the public will benefit from an informed decision. In both cases, the final determination rests with the Administrator. Therefore, we conclude that a regulation requiring reasonable testing by manufacturers to assist in the development of a production-model test would be proper exercise of the Administrator's rule-making authority under section 301(a).

15. The final problem with viewing section 301(a) as authorizing the regulation in question is that regulations issued thereunder are not expressly made enforceable under the terms of the Clean Air Act. The violation of such regulations is not a prohibited act under section 203; thus, no penalties attach under Title II of the Act. This fact arguably leads to the conclusion that regulations established under section 301(a) were not intended to create enforceable duties, but are restricted to agency procedure and administrative matters. Since we find no legislative history to this effect, however, we see no reason to adopt a restrictive interpretation of 301(a) which is not indicated by its terms. Moreover, the availability of 28 U.S.C. 1337, compels us to reject a restrictive view of section 301(a). Section 1337 provides,

> The district courts shall have original jurisdiction of any civil action or proceedings under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monoplies.

16. The purpose of this statutory provision was explained in N.L.R.B. v. British Auto Parts, Inc., 266 F. Supp. 368, 374 (C.D. Cal. 1967) affirmed 405 F. 2d 1182 (9th Cir. 1968):

> This statutory provision vests the district courts with jurisdiction to aid administrative agencies in carrying out their congressionally authorized powers and duties, despite the absence of any express grant of district court jurisdiction under the agencies' respective enabling legislation.

As the United States Supreme Court held in Capital Services Inc. v N.L.R.B., 347 U.S. 501, 74 S. Ct. 699, 702, 98 L. Ed. 887 (1954),

> The District Court had jurisdiction of the subject matter, because this is a 'civil action proceeding' arising under an Act of Congress 'regulating commerce.' 28 U.S.C. section 1337... In the absence of a command to the contrary, the power of the District Court to issue the injunction is clear.

17. The Clean Air Act is an "Act of Congress regulating commerce" within the meaning of 28 U.S.C. 1337. As Judge Thomsen concluded in United States v. Bishop Processing Company, 287 F. Supp. 624, 632 (D. Md. 1968), "Congress had a rational basis for finding that air pollution affects commerce..." Moreover, the cause of action would arise under the Clean Air Act if manufacturers refused to comply with regulations requiring testing for the purpose of developing an effective production-model test and the Administrator requested the Attorney General to obtain injunctive relief. Finally, the Clean Air Act contains no express bar to the jurisdiction of federal district courts over civil actions to enforce regulations issued pursuant to section 301(a) of the Act. Capital Services Inc. v. N.L.R.B., supra. Therefore, the equity powers of district courts are available to enforce regulations compelling automobile manufacturers to conduct tests to assist the Administrator in developing a correlation between no or low-mileage emission data and 4,000 mile emission data.

18. Even in the absence of a general jurisdictional statute such as 28 U.S.C. 1337, federal district courts would appear to be authorized to issue injunctions to enforce provisions Federal law "in the public interest." Walling v. Brooklyn Braid Co., 152 F. 2d 938, 940-1, (2d Cir. 1945) holds,

> Though the Fair Labor Standards Act...does not expressly provide for enforcement by injunction, that remedy is available to the Administrator. The action taken below was based upon the general powers of courts of equity to grant injunctions... Good administration of the statute is in the public interest and that will be promoted by taking steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they have begun. The trial court...in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purpose underlying its enactment shall not be thwarted.

19. Although we have concluded that manufacturers may be compelled by regulation to conduct reasonable test programs for the specified purpose, we make no findings with respect to what constitutes a "reasonable test program" or whether any particular regulation would be considered reasonable.

§ § § § § § §

TITLE: Requiring Manufacturers to Submit Developmental Vehicles for Testing

DATE: October 30, 1972

MEMORANDUM OF LAW

FACTS

In an August 17, 1972 memorandum, to you, Karl H. Hellman, Staff Assistant, DECT, pointed out that EPA's assessment of motor vehicle emission control technology would be aided if EPA could require manufacturers to provide 1975-76 prototype vehicles for testing by EPA. Your memorandum of August 14, 1972 requests that we evaluate the authority to make such a requirement.

QUESTION

Does authority exist for EPA to require motor vehicle manufacturers to provide to EPA for EPA testing 1975-76 prototype developmental vehicles?

ANSWER

There is no authority in the Clean Air Act, either express or implied, which would empower the Agency to require manufacturers to submit such vehicles for testing by EPA.

DISCUSSION

1. Sections 202, 206, and 208 of the Clean Air Act contain the information-gathering authority available to EPA regarding motor vehicles. Sections 206 and 208 specifically limit the gathering of information to matters related to

compliance by a manufacturer with the Act and implementing regulations. Since the data involved here relates to an assessment of technology development and not compliance with applicable regulations, those sections could not be invoked.

2. Section 202(a)(4) provides the Administrator broad authority, including the subpoena power under §307, to obtain information on vehicle emission control systems for purposes of preparing an annual report to the Congress. The subpoena power is also available to the Administrator to obtain information on emission control technology for purposes of providing it to the National Academy of Sciences for its investigation and annual report to the Congress on the same topic (§202(c)). There is no express authorization in either provision for the Administrator to require manufacturers to submit vehicles for EPA testing. Section 307(a) of the Act authorizes the Administrator to require "the production of relevant papers, books, and documents" and oral testimony. This language does not appear to support a requirement that manufacturers submit their vehicles for testing by EPA. The clear thrust of the §202 and §307 provisions is that the Administrator shall be able to obtain information in the hands of manufacturers or others. This would include test data on prototype, developmental vehicles.

3. If the Congress had not provided specific information-gathering authority in the Administrator to assess the status of technology development, a plausible argument might be made that implied authority could be found in §301(a) of the Act to allow EPA to promulgate regulations reasonably necessary to the discharge of its responsibilities under §202. Such regulations could conceivably include a requirement such as the one advanced by Mr. Hellman.

§ § § § § § §

TITLE: Certification of Three-Quarter Engines

DATE: August 13, 1971

FACTS

Mack Truck, Inc. produces and sells the following types of diesel engines for the replacement market:

1) The basic engine, which is a complete engine capable of operation;
2) The "short engine assembly" (3/4 engine), which is the basic engine less the fuel system;
3) The "short block assembly" (1/4 engine), which is the engine block only, and does not include fuel system, electrical equipment, or exhaust manifolds.

Mack contends that the 1/4 and 3/4 engine assemblies are not motor vehicle engines subject to the Clean Air Act, and therefore need not be covered by certification of conformity with diesel smoke emission standards. OAP's Division of Motor Vehicle Pollution Control (DMVPC) agrees that the 1/4 block need not be certified, but feels that the 3/4 engine should be considered an engine subject to the Act. DMVPC's position is that since the fuel system for the 3/4 engine is an optional item readily and typically installed by the purchaser, the 3/4 engine is for practical, regulatory purposes a motor vehicle engine at the time Mack sells it. DMVPC argues that allowing 3/4 engines to be sold without certification could encourage engine manufacturers to emphasize sales of such engines in order to circumvent EPA's regulations, thereby subverting the intent of sections 202 and 203 of the Act.

QUESTION

May EPA require certification of diesel engines which are not capable of propelling a motor vehicle?

ANSWER

The Clean Air Act provides EPA limited discretion to determine what engines are motor vehicle engines subject to regulation under the Clean Air Act. Specifically, engine configurations which are not capable of operating to propel a motor vehicle but which the purchaser may readily place in that status by the addition of optional components may be subjected to regulation in cases where the alternative is to acquiesce in actual or threatened circumvention of the purposes of the Act.

DISCUSSION

In our memorandum of April 27, 1971, we considered the question of whether "short blocks" (1/4 engines) are motor vehicle engines within the meaning of the Clean Air Act, and concluded that they clearly are not, and that they should be treated as any other major component part in the replacement market. In the memorandum we stated that the Act's definition of "motor vehicle," i.e., "any self-propelled vehicle designed for transporting persons or property on a street or highway," implicitly defines "motor vehicle engine" to mean any engine which is capable of propelling a motor vehicle.

The facts in this case have caused us to consider whether that definition should be considered absolute, or whether some discretion is left in the Agency to define "motor vehicle engine." Looking again at the relevant provisions of the Act, we conclude that the Congress was concerned basically with engines capable of operation. However, we cannot think that the Congress intended that manufacturers who build what in almost every respect is a complete engine should be allowed to escape Federal emission control regulation by the simple expedient of leaving unattached one readily added functional component, especially when the engines involved are available alternatives in the replacement market to complete engines which must conform to standards. Absent express language indicating congressional intent to create such a loophole, we believe that the administering agency has the discretion to see that it does not exist. The implied definition of "motor vehicle engine" permits this flexibility in the Agency.

DMVPC has analyzed the circumstances surrounding Mack's intended marketing of the 3/4 engine and has concluded that sound regulatory practice demands that these engines be considered subject to the Act. We believe that the Act affords the Agency sufficient discretion to determine that an engine of this configuration should be regulated.

HEAVY DUTY ENGINES

TITLE: Standard Setting for "Low-Emission Vehicles" with Heavy-Duty Engines - Section 212 of the Clean Air Act

DATE: September 24, 1971

FACTS

On June 29, 1971, regulations were proposed establishing procedures by which the Administrator of the Environmental Protection Agency will determine whether an applicant vehicle qualifies as a "low-emission vehicle" under Section 212 of the Clean Air Act. These regulations, however, were applicable only to light-duty motor vehicles. The notice of proposed rule making (36 F.R. 12240) stated, "Regulations relating to vehicles which the applicant seeks to substitute for heavy-duty motor vehicles will be proposed as soon as practicable."

A draft briefing memorandum prepared by the Bureau of Mobile Source Pollution Control proposes a system for establishing such heavy-duty vehicle regulations for the purpose of section 212 of the Act. The proposal is that --

1) for the purpose of section 212, low-emission heavy-duty vehicles should be defined in relation to reductions from the proposed 1973 heavy-duty diesel engine emissions standards under section 202;

2) 97% reductions from the proposed 1973 standards should be required for CO or HC or 70% reduction for NO in order for a heavy-duty vehicle to qualify as a low-emission vehicle; and

3) no reduction of smoke emissions should qualify a heavy-duty vehicle as a low-emission vehicle for the purpose of section 212 of the Act.

ISSUES

1. In establishing regulations defining a "low-emission vehicle" in the context of heavy-duty engines for the purpose of section 212 of the Clean Air Act, is the Administrator authorized to set significant reduction levels only for gaseous pollutants and require that smoke emissions not exceed the standard? Or must some level of significant reduction be established for smoke?

2. Is the Administrator authorized to set different reduction levels for different pollutants or must the same percentage reduction apply to each pollutant in determining what constitutes a "significant" reduction within the meaning of section 212(a)(4)(A)?

3. Is the Administrator authorized to establish section 202 heavy-duty diesel emission standards as the sole baseline for determining a "significant" reduction under section 212(a)(4)(A)? Or must he also take section 202 heavy-duty gasoline emission standards into consideration?

ANSWERS

1. Although the language of section 212 would permit a substantial argument to the contrary, the Administrator is authorized to define significant reductions solely in terms of gaseous pollutant emissions.

2. The Administrator is authorized to set different reduction levels for different pollutants in determining what constitutes a "significant" reduction under section 212(a)(4)(A).

3. The Administrator is authorized to establish section 202 heavy-duty diesel emission standards as the sole baseline for determining a "significant" reduction under section 212(a)(4)(A).

DISCUSSION

1a. Section 212(a)(4) of the Clean Air Act defines a "low-emission vehicle" for the purpose of that section as "any motor vehicle which --

> (A) emits any air pollution in amounts significantly below new motor vehicle standards applicable under section 202 at the time of procurement to that type of vehicle; and
>
> (B) with respect to all other air pollutants meets the new motor vehicle standards applicable under section 202 at the time of procurement to that type of vehicle.

b. Pursuant to section 202 of the Act, regulations are being prepared to regulate emissions from heavy-duty gasoline engines and heavy-duty diesel engines. Since gasoline engines do not emit smoke, no standard is anticipated limiting smoke emissions from gasoline engines. However, a limitation on smoke emissions is planned for diesel engines.

c. The Bureau of Mobile Source Pollution Control suggests the use of proposed diesel emission standards under section 202 (except the standard applicable to smoke) as the baseline from which to calculate a "significant" reduction for the purposes of section 212(a)(4)(A). However, it is clear that smoke is an "air pollutant" within the meaning of section 202(a) (and 212(a)(4)), since it may adversely affect "the public health or welfare." Moreover, standards limiting the emission of smoke will be applicable under section 202 "at the time of procurement" of 1973 model low-emission vehicles, if the BMSPC's proposal is adopted. Since section 212(a)(4)(A) refers to "any air pollutant", it is arguable that some level of reduction of smoke emissions must be considered sufficiently significant (even if this means a 100% reduction) to qualify an applicant vehicle as a "low-emission vehicle" within the meaning of section 212(a)(4).

d. In our view, however, the Administrator is authorized to define "low-emission vehicle" by regulation to require a significant reduction in emission of any gaseous pollutant and, thereby, exclude smoke reduction as a basis for qualifying for certification as a "low-emission vehicle." We reach this conclusion for the following reasons:

e. First, S. 3072, the Senate bill which was the original source of section 212 of the Clean Air Act, defined as "low-emission vehicle" as "any motor vehicle which produces significantly less pollution than the class of model of vehicles for which the Board may certify it as a suitable substitute." (section 2(4)). This section granted the Secretary [now Administrator] wide discretion to determine which pollutants had to be reduced and by how much in order for a vehicle to be considered a "low-emission vehicle". The Senate version of the "Clean Air Amendments of 1970," S. 4358, contained a provision identical to S. 3072. 1/ It is true that the conferees on H. R. 17255 modified this provision to specify that emission standards under section 202 should form the baseline from which to determine significant reduction of emissions. However, there is no indication in the legislative history that the Congress intended to limit administrative discretion to determine how much reduction is significant and what pollutant(s) must be reduced for a vehicle to qualify as a "low-emission vehicle".

f. Second, the language of a statute, if reasonably open to alternative constructions, should not be read so as to frustrate the ultimate purpose of the Congress. In this case, section 202 may be read in two ways. It may be construed to mean that some reduction in any air pollutant to which a section 202 emission standard applies must qualify the vehicle as a low-emission vehicle. Alternatively, it may be construed to mean that a significant reduction in any air pollutant designated by the Administrator would entitle the vehicle to consideration as a low-emission vehicle. The latter reading is clearly more consistent with the intent of Congress. An essential purpose of section 212 was to provide financial incentives to assist in developing technology which would reduce major air pollution problems from new motor vehicles. 2/ The major health problems relating to air pollution from new motor vehicles arise from emission of carbon monoxide, hydrocarbons, and oxides of nitrogen, as Congress itself recognized by adopting section 202(b)(1) of the Act. 3/ While smoke emissions are aesthetically offensive and contribute to particulate concentrations in the ambient air, they do not pose a health hazard. Moreover, the technology already exists to eliminate smoke emissions from diesel engines.

g. Thus, if reduction of smoke emissions would qualify a vehicle as a "low-emission vehicle," section 212 would not have the intended effect of stimulating new technological development. Furthermore, section 212 provides no mechanism by which the Administrator can give preference to one "low-emission vehicle" over another. Therefore, a non-smoking diesel is almost certain to be procured when in competition with an unconventional engine which emits low oxides of nitrogen, since the latter is likely to require greater maintenance and

---

1/ Congressional Record, September 22, 1970, S. 16229-30.

2/ Congressional Record, September 22, 1970, S. 16231 (Sen. Magnuson).

3/ The Senate Commerce Committee's Report on S. 3072, the forerunner of section 212, emphasized reductions in carbon monoxide, hydrocarbons, oxides of nitrogen, lead, and oxidants. Report No. 91-745, March 20, 1970, pp. 3-4.

more expensive fuels than the conventional diesel.[4] Knowing that such competition is unlikely to produce victory, potential developers of unconventional engines are unlikely to invest great amounts of time and money to compete for the guaranteed section 212 market. This result would be exactly contrary to the expressed intent of Congress.

h. Thus, although the language of section 212(a)(4) would permit a substantial argument to the contrary, we conclude that section 212 authorizes the Administrator to establish section 212 emission standards without reference to reduction in smoke emissions if he deems it necessary to do so to carry out the will of Congress and the ultimate purpose of section 212.

2a. There is nothing in the language of the statute or the legislative history which specifies what constitutes a significant reduction for the purpose of section 212(a)(4)(A). Consequently, such a determination is left to the judgment of the Administrator. Moreover, nothing in the language or history of section 212 limits the exercise of administrative judgment so that significant reduction must be the same percentage from allowable emissions for every air pollutant.

b. The differences in the percentage of reduction which is significant from one pollutant to another may not be arbitrary or capricious. But so long as they are based on identifiable and rational consideration, such as the difficulty of controlling a pollutant, the seriousness of harm which may result from its emission, or the extent to which emissions of such pollutant may be controlled from stationary sources, different percentage reductions may be prescribed for different air pollutants.

3a. The answer to the third question turns upon construction of the word "type" in section 212(a)(4)(A) of the Act. On the one hand, the word may refer to the distinction between heavy-duty diesels and gasoline engines. If this is the case, then an applicant heavy-duty diesel engine would have to meet all heavy-duty diesel emission standards under section 202 and emit significantly less than such standards with respect to at least one pollutant. Similarly, an applicable heavy-duty gasoline engine would have to meet all heavy-duty gasoline engine standards under section 202 and emit significantly less than such standards with respect to at least one pollutant. These requirements would apply regardless of the type of vehicle for which the applicant vehicle is proposed to be substituted.

b. On the other hand, the word "type" may be construed to refer to the distinction between light-duty vehicles and heavy-duty vehicles (i.e., those using heavy-duty engines). In this case, a set of standards under section 202 would have to be designated (for the purpose of section 212) as the baseline for determining a significant reduction of any air pollutant from the allowable emissions from heavy-duty vehicles. This baseline along with a statement of what constitutes a significant reduction for each pollutant would apply for the purposes of section 212(a)(4) regardless of whether the applicant vehicle seeks to be substituted for a gasoline engine or diesel engine-powered vehicle.

---

[4] See section 212(f)(1) and (2) of the Clean Air Act.

c. The first construction must be rejected. As indicated previously, section 212 was designed, in part, to stimulate and encourage the development of unconventional propulsion systems, such as the turbine engine, the Waenkel engine, and the Rankin engine. Since no emission standards apply to such systems under section 202, no vehicles using such systems could be found to be "low-emission vehicles" under section 212 if the first construction were adopted. Therefore, the latter construction of the word "type" must be adopted.

d. However, this conclusion leaves open the question of what standards under section 202 may be designated as the baseline for heavy-duty vehicles for the purpose of section 212. The proposed briefing memo suggests that proposed 1973 emission standards applicable to new diesels (except for the smoke standard) should constitute the baseline. To rely on such standards as the baseline would effectively prevent ordinary diesel vehicles from being substituted for gasoline-powered heavy-duty vehicles. Preventing diesels from substituting for gasoline engines would frustrate congressional intent in one respect, i.e., the desire to have government vehicles emit as little as possible. On the other hand, if diesel engines can be produced by 1973 which significantly reduce the emission of one pollutant from the 1973 standards while meeting the section 202 diesel standards with respect to all other pollutants,[5] then Congress' dual purposes will have been served--1) encouraging development of new technology to reduce emissions, and 2) recognizing the "obligation of Government...to disrupt the environment as little as possible when conducting its own activities."[6]

e. Moreover, to rely on section 202 heavy-duty gasoline-engine standards as the baseline would have the unintended effect of discouraging development of new technology. This is true, because a diesel engine emits significantly less carbon monoxide and hydrocarbon than a gasoline engine and could be declared a "low-emission vehicle" without any modification or improvement. Potential developers of less conventional engines might be discouraged from applying, if an ordinary diesel could qualify. Since the diesel would have more normal fuel use, reliability, and durability characteristics than such unconventional engines, it would be accorded preference over less conventional completing vehicles by the Low-Emission Vehicle Certification Board.

f. For these reasons, the Administrator if authorized to use the proposed section 202 standards applicable to 1973 diesel engines as the baseline for all heavy-duty vehicles seeking certification under section 212 of the Act.

---

[5] We are informed by Tom Edgar, Ed Reich, and Graham Hagey of BMSPC that there is a reasonably high probability that this can be accomplished.

[6] Congressional Record, September 22, 1970.

§ § § § § § §

TITLE: Information Requirements - Heavy-Duty Engine Manufacturers
(Section 208)

DATE: March 20, 1972

MEMORANDUM OF LAW

FACTS

Manufacturers of heavy duty motor vehicle engines must obtain a certificate of conformity with applicable EPA standards before these engines can be sold. Many of these engines are purchased by heavy duty vehicle manufacturers who install them in their vehicles. If the vehicle manufacturer changes the configuration of the engine as certified, he must obtain certification of the modified engine At present, MSPC's ability to identify all vehicle manufacturers who should be obtaining such certification is limited. A note of March 6, 1972, from Jan Lane of the Mobile Source Pollution Control Division, points out that the only accurate source of a list of heavy duty vehicle manufacturers is the engine manufacturers who sell them engines.

QUESTION

May EPA require manufacturers of heavy duty engines to identify the heavy duty vehicle manufacturer to whom their engines are sold?

ANSWER

The submission of this information may not be required, since it is not related to the engine manufacturer's certification or his compliance with applicable regulations.

DISCUSSION

1. The information requirement in question could only be imposed if authorized under §208 of the Act or as a reasonable condition of certification under 40 CFR 85.55.

2. The relevant language of §208 provides that "every manufacturer shall establish and maintain such records, make such reports, and provide such information as the Administrator may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this part and regulations thereunder...". We can establish no connection between the purchaser list sought and any determination as to an engine manufacturer's compliance. The list would only provide a means to identify vehicle manufacturers utilizing the engines, so that MSPC could determine their compliance.

3. Under §85.55(a)(2) of the regulations, the Administrator may impose "... such terms as he may deem necessary to assure that any new motor [engine] covered by the certificate will meet the requirements of these regulations relating to durability and performance. These terms must be reasonably related to matters which the engine manufacturer has some ability to control. Presumably, there are no terms which EPA could reasonably impose upon the

engine manufacturer which could provide assurance that the certified engines would meet durability and performance requirements once in the hands of a vehicle manufacturer who may modify them in some fashion. Therefore, the imposition of this condition upon a certificate is not an available alternative.

4. It is EPA's responsibility to identify vehicle manufacturers and to insure that they are acting in compliance with applicable regulations. Obtaining the cooperation of engine manufacturers, governmental agencies, and trade associations appears to be the only method available to MSPC.

§ § § § § § §

TITLE: Warranties and Maintenance Under Section 207

DATE: April 10, 1972

MEMORANDUM OF LAW

FACTS

The warranty instructions which manufacturers of motor vehicles have provided to the purchasers of 1972 model year vehicles raise several questions under §207(a) and (c) of the Clean Air Act. Also, questions have arisen concerning the requirement of EPA regulations that manufacturers begin in 1973 providing a copy of their maintenance instructions to EPA for a determination as to whether such instructions are "reasonable and necessary to assure the proper functioning of the vehicle or engine's emission control system".

QUESTION #1

Are §207(a) and (c)(3) self-executing and applicable to 1972 model year motor vehicles?

ANSWER #1

The requirements of both sections are directly imposed by the Congress and do not require agency action to put them into effect. The Act expressly provides that they shall be in effect with respect to model years beginning more than 60 days after its enactment, i.e., beginning with the 1972 model year.

QUESTION #2

May the motor vehicles manufacturers condition their §207 (a) warranties on "proper use and maintenance" or some equivalent requirement?

ANSWER #2

No. The conditioning of the §207(a) warranties on "proper use and maintenance" is inconsistent with the legislative purpose.

QUESTION #3

Does Ford Motor Company's provision conditioning its §207(a) warranty upon a determination by the Administrator of EPA that emission system parts or workmanship is defective comply with requirements of the Act?

ANSWER #3

No. Such a determination is not an express requirement of §207(a) and may not be imposed unilaterally by a manufacturer.

QUESTION #4

Does §207(a) permit the motor vehicle manufacturer to disclaim responsibility for consequential damages which the automobile owner may incur as a result of a defect-related malfunction which causes the vehicle to exceed applicable standards?

ANSWER #4

Section 207(a) precludes the automobile manufacturer from disclaiming responsibility for consequential damages to the vehicle owner which are directly and proximately caused by the failure of the vehicle to comply with applicable emission standards.

QUESTION #5

What action can EPA take under the Clean Air Act if maintenance instructions provided to ultimate purchasers pursuant to §207(c)(3) are determined by EPA to be unreasonable or unnecessary?

ANSWER #5

Nothing precludes the EPA from requesting that a manufacturer revise his maintenance instructions, but if this fails to obtain acceptable results, EPA may seek a court order pursuant to §203(a)(4)(B) of the Act to compel compliance with §207(c)(3).

QUESTION #6

What is the scope of EPA's inquiry to determine whether or not a manufacturer's maintenance instructions are "necessary"?

ANSWER #6

EPA's primary responsibility is to insure that the manufacturer poses no unnecessary requirements, and EPA may further require that instructions on maintenance which it determines is necessary to assure the proper functioning of the emission controls be provided to the purchaser.

QUESTION #7

Does the "properly maintained and used" wording of §207(c)(1) have the same meaning as the "maintained and operated in accordance with instructions" wording of §207(b)(2)(A)?

ANSWER #7

It appears that the Congress intended both phrases to refer to the "reasonable and necessary" maintenance instructions under §207(c)(3), but EPA is not required to interpret §207(c)(1) as requiring proper maintenance by the owner in all respects.

QUESTION #8

If a manufacturer does not provide maintenance instructions to the vehicle purchaser, is the purchaser required to show any proof of use or maintenance to obtain recovery under the §207(b) warranty and the §207(c) recall?

ANSWER #8

Since §207(c)(3) allows the manufacturer to protect himself against unreasonable use and maintenance by the vehicle purchaser, if he does not avail himself of this protection by providing the instructions he must be viewed as having waived and right to demand that the maintenance be performed and documented.

DISCUSSION

NOTE: For purposes of clarity, the topics in this section are numbered to coincide with the corresponding questions and answers above.

1. As we have orally advised in the past, §§207(a) and 207(c)(3) of the Act are self-executing. There is no suggestion in the statutory language or in the legislative history that any action by EPA is required to place them in effect. Each section is prefaced by the language, "effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after the date of enactment of the Clean Air Amendments of 1970...." The model year referred to is unquestionably 1972.

One manufacturer asserts that EPA's delay in promulgating a definition of the term "useful life" led them to delay including a §207(a) warranty for 1972, since that term is included in that warranty. This assertion does not bear up well in light of the facts that, 1) "useful life" for light duty vehicles is defined in §202 (d)(1) of the Act and could not be changed by EPA, and 2) this was clearly set forth in EPA's proposed regulation of May 11, 1971 (36 F. R. 8698).

Regarding the 207(c)(3) requirement, it may be true that EPA personnel led manufacturers to believe that the requirement would not apply until 1973. However, the regulations on this subject only deferred the model year applicability of the submission of proposed maintenance instructions to EPA for review, not the Act's required provision of the instructions to the vehicle purchaser.

2. Questions 2, 3, and 4 raise this broad issue: "When the Congress requires a manufacturer to warrant automobiles to purchasers in a specified manner, may the manufacturer impose conditions on this warranty, and if so to what extent?" It is our view that a manufacturer may impose conditions upon a statutorily required warranty, so long as the conditions are not inconsistent with the legislative purpose, as expressed in the provisions of the statute and in the legislative history. By "inconsistent", we mean that the conditions may not interfere with the result which the Congress intended to accomplish.

In §207, Congress imposed these three warranties regarding motor vehicles and motor vehicle engines:

(a) Section 207(a)(1): the vehicle or engine must be warranted to be designed, built, and equipped so as to conform at the time of sale with applicable regulations...." [emphasis added].

(b) Section 207(a)(2): the vehicle or engine must be warranted to be "free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life...."

(c) Section 207(b): when the Administrator so prescribes by regulation, the vehicle or engine must be warranted to remain in compliance with applicable regulations for its useful life if maintained and operated in accordance with instructions provided by the manufacturer prescribing maintenance necessary to "assure the proper functioning of emission control devices and systems".

By its terms, the §207(a)(1) warranty relates only to actions taken prior to sale, and maintenance and use occurring after the sale are not relevant. Consequently, a condition requiring certain maintenance and use is inconsistent with the Act and is not permissible.

Restated, the §207(a)(2) warranty says "The parts and labor that went into this vehicle or engine were not flawed or incomplete in any way that would prevent compliance with applicable emission standards for five years or 50,000 miles". This is not a guarantee that the vehicle will conform to the standards for its useful life; that guarantee is covered by the performance warranty provided for in §207(b), which is statutorily conditioned upon the owner's maintenance per the §207(c)(3) instructions. Neither does 207(a)(2) require a guarantee that parts will function for 50,000 miles. If the manufacturer wishes to utilize parts that are not designed to last for 50,000 miles, whether the parts are spark plugs, or emission control devices or valves, he is free to do so insofar as his 207(a)(2) warranty is concerned.

A vehicle owner claiming under the 207(a)(2) warranty has the burden of proving that defect in the part or its installation caused his vehicle to fail to conform to the standards. He will probably best be able to sustain that burden if he can document, by showing proof of maintenance performed, that he did not abuse the part involved. Absent such documentation, the manufacturer will undoubtedly claim that lack of necessary maintenance and not a defect caused the part to fail. Therefore, the question of maintenance is relevant to recovery under the 207(a)(2) warranty.

It does not follow, however, that a manufacturer may expressly condition this warranty on proper use and maintenance. Because Congress conditioned the 207(b) warranty on the owner's carrying out maintenance but did include this condition in 207(a)(2), the implication is that it did not intend the latter to be so limited. Moreover, the condition in question may do violence to the legislative purpose, for if a part fails because of a defect at 20,000 miles and the owner did not obtain prescribed maintenance to the part at 12,000 miles, the owner's warranty claim is automatically barred even though the lack of maintenance did cause the failure. Accordingly, we think that such a condition is inconsistent with the Act and may not be imposed by a manufacturer.

3. Ford has conditioned its 207(a)(2) warranty upon a finding of a defect by the Administrator. This condition would impose upon the Administrator a fact-finding responsibility which is in no way suggested by the language of the section or its legislative history. We think this burden is one which may only be imposed by Congress, the Administrator himself or, conceivably, the courts. It is not consistent with the Act and therefore must be deleted.

4. In the normal contractual situation, a manufacturer may include in a warranty against defects in parts a proviso protecting him from liability for consequential damages suffered by the purchaser as a result of part failure. If he does not do so, the manufacturer may be liable for any damages to the purchaser which are the natural and proximate result of the breach of warranty, and which may reasonably be considered as within the contemplation of the parties at the time of the contract. 1/ Where the warranty is imposed upon the manufacturer and purchaser by statute, however, it is the damages contemplated by the Congress which are relevant. Here, the Congress was concerned with defects which would prevent a vehicle from remaining in compliance with applicable Federal emission standards. It seems clear that the Congress must have contemplated that the owner whose vehicle fails to conform to applicable standards because of part or workmanship defect might be penalized in a State motor vehicle emission testing program. Such a penalty is directly related to the warranty, and we conclude that an attempt by the manufacturer to exclude liability for the penalty is not consistent with the congressional purpose in §207(a)(2). Other consequential damages cannot, presumably, be directly related to the emission control purpose of the warranty, and the manufacturer may protect himself with respect to them without undercutting the legislative scheme.

5. As we informally advised previously, §207(c)(3) imposes a burden upon EPA to judge whether the maintenance instructions which the manufacturer is required to supply to the vehicle purchaser are "reasonable and necessary to assure the proper functioning of emission control devices and systems". Our conclusion is based upon our assessment of the legislative intent behind the section. Congress imposed a condition regarding maintenance to insure that manufacturers would not be required to honor performance warranties for vehicles which had not been given adequate care by owners. Section 207(c)(3) adds to this scheme the requirement that maintenance instructions be provided to purchasers so that they would be aware of what maintenance they must obtain to protect their warranty rights. Because this approach, without more, would enable the manufacturers to impose unreasonably stringent requirements on purchasers to protect their own interests, Congress stated that the instructions should prescribe "reasonable and necessary" maintenance only. The Senate Committee on Public Works, which originated the relevant provision (without the "reasonable and necessary" language), said in its report that the instructions would have to be "reasonable and uncomplicated" and "would have to be approved by the [Administrator]" (Sen. Rept. No. 91-1196, 91st Cong., 2d Sess., p. 30). While an equivalent statement does not appear in the Conference Report, the conferees adopted the Senate bill's approach and inserted the terms

---

1/ C.J.S. Sales §374 (1965).

"reasonable" and "necessary" into the section itself. This action evidences adoption of the Senate's scheme. Accordingly, we think the Congress intended that the Agency evaluate the maintenance instructions and take action under the authority in §203(a)(4)(B) when EPA has substantial disagreement with a manufacturer's determination of what maintenance is reasonable and necessary.

6. As discussed in paragraph 5, above, a chief purpose of the maintenance instruction requirement in §207(c)(3) is to insure that the manufacturer imposes no unreasonable or unnecessary requiremens. Question #6, however, raises the issue of whether EPA can also, under this section, require a manufacturer to include instructions on maintenance which EPA, presumably through certification testing, has determined is necessary "to assure the proper functioning of emission control devices and systems", although the manufacturer does not agree that this is the case. This issue has also been raised by MSPC in connection with its experience with recurrent valve failure of one manufacturer's durability vehicles.

While there is no indication in the legislative history of §207(c)(3) that the Congress was considering the problem of inadequate maintenance instructions when it adopted the section, the language of the section appears to cover this situation. Certainly, the "proper functioning" of emission controls cannot be assured if owners do not obtain all necessary maintenance, and the instructions provided by the manufacturers pursuant to this section are the logical means of adequately instructing the owners. Where MSPC identifies certain maintenance to durability vehicles as being essential to the certification of those vehicles, it follows that production vehicles covered by that certificate should receive the same maintenance to provide adequate assurance that they will comply with the standards. We are compelled to say, therefore, that §207(c)(3) provides an adequate basis for EPA to require manufacturers to include certain necessary maintenance instructions.

7. It appears that the "properly maintained and used" language of §207(c)(1) and the "maintained and operated in accordance with instructions" wording of §207(b)(2)(A) both refer to the maintenance described in §207(c)(3). The Conference Report indicates that the conferees viewed the two phrases as having the same meaning, since "proper operation and maintenance" [emphasis added] is used in referring to the performance warranty and "properly maintained and used" [emphasis added] is employed in discussing the recall. (H. R. Rept. No. 91-1783, 91st Cong., 2d Sess., p. 51). As we have pointed out above, the Congress' view was that the maintenance instructions would set forth the proper maintenance, as reviewed and concurred in by EPA.

This does not mean that for a vehicle to qualify for inclusion in a recall test fleet under §207(c)(1) the owner must have been maintained in accordance with §207(c)(3) instructions in all respects. As NSPC has pointed out, certain maintenance must be performed at a given time or permanent adverse effects on emission control may reasonably be expected. On the other hand, much of the maintenance prescribed in maintenance instructions is non-critical; if it is performed just prior to emission testing, any adverse effect on emissions that its prior nonperformance may have created are remedied. Therefore, if MSPC or its contractor verifies that a vehicle has received the critical §207(c)(3) maintenance by the owner and then performs the noncritical §207(c)(3) maintenance prior to testing, that vehicle may be considered to have received the "proper" maintenance contemplated by §207(c)(1). This method adequately protects the manufacturer while enabling EPA to effectuate the purpose of §207(c)(1), which is to provide a program to verify in the field that the manufacturer builds production vehicles capable of performing the same as the certified prototype vehicles which represent them. Information which MSPC has accumulated shows that disqualifying vehicles from the test fleet because the owners had not obtained all the maintenance prescribed by the manufacturer at the time prescribed would so restrict the eligible vehicles that a recall testing program would be impracticable.

With respect to any maintenance included in the instructions which EPA considers unreasonable or unnecessary, EPA should be on record as opposing it; this would provide a basis for excluding it from consideration under a recall testing program. This exclusion could, of course, be an issue in any public hearing requested by a manufacturer who is ordered to recall and repair vehicles.

§ § § § § § §

TITLE: Approval of Maintenance Instructions as Prerequisite to Sale

DATE: July 13, 1972

MEMORANDUM OF LAW

FACTS

In a July 5, 1972 letter, Fred W. Bowditch, Director, Automotive Emission Control, General Motors Corporation, asked for a written interpretation of Subpart M of the EPA Motor Vehicle Regulations which governs the approval of maintenance instructions. He states that the request is based upon an indication that MSPC interprets those regulations as "requiring approval of maintenance instructions prior to first sale."

QUESTION

Does the Clean Air Act or EPA regulations require that a motor vehicle manufacturer obtain approval of maintenance instructions, required by §207(c) to be given to the ultimate purchaser of the vehicle, before he can sell any of the vehicles covered by those instructions?

ANSWER

No. Failure or refusal to comply with the maintenance instructions requirements of §207(c) is prohibited by §203(a)(4)(B) of the Act, but there is no express prohibition against selling a vehicle prior to such compliance, and we conclude that such a prohibition has not been and may not be imposed by regulation.

DISCUSSION

1. Section 207(c)(3) of the Clean Air Act requires that each manufacturer "... furnish with each new motor vehicle or new motor vehicle engine such written

instructions for the maintenance and use of the vehicle or engine by the ultimate purchaser as may be reasonable and necessary to assure the proper functioning of emission control devices and systems." Noncompliance with this requirement is prohibited by §203(a)(4)(B) of the Act as follows:

> "For any manufacturer of a new motor vehicle or new motor vehicle engine subject to standards prescribed under §202 (B) to fail to refuse to comply with the requirements of §207(c)...."

Notably, the quoted provision contains no reference to the sale of the vehicle or engine. In contrast, another portion of the same section, 203(a)(4)(A), expressly prohibits sale or lease by a manufacturer unless he has complied with certain provisions of the law. If Congress had wished to impose the prohibition on sales with respect to compliance with §207(c), it clearly could have done so. We think that Congressional emission of the prohibition bars imposition of any regulatory requirement that EPA approval of instructions be a prerequisite to sales.

2. The current regulations in Subpart M are consistent with this conclusion. Section 85.161 of that subpart requires that the manufacturers submit proposed maintenance instructions to the Administrator at specified times, but it does not either expressly or impliedly provide that the manufacturer may not sell vehicles until approval is given by the Administrator. The regulations are designed, however, to enable the Administrator to receive the instructions in time to disapprove any objectionable portions prior to the sale of vehicles to ultimate purchasers, so that purchasers may have the proper instructions at the time of purchase.

3. The Agency's course of action in the case of a failure or refusal to comply with the requirements of §207(c)(3) regarding maintenance instructions is, assuming the manufacturer refuses to conform the instructions to EPA's directions, to institute a suit under §204 of the Act to compel the manufacturer to supply to the ultimate purchaser maintenance instructions approved by the Administrator. Civil penalties under §205 are also available and may be sought in appropriate cases.

§ § § § § § §

TITLE: Section 207 of the Clean Air Act and Related Provisions

DATE: September 20, 1973

INTRODUCTION

By memorandum dated November 1, 1972, the Air Quality and Radiation Division has asked the Mobile Source Enforcement Division to provide a legal discussion of the relationship between the two warranty programs authorized by Sections 207(a) and 207(b) of the Clean Air Act, recall under §207(c), certification under §206, and the prohibition against tampering contained in §203 (a)(3).

Briefly stated, the conclusion is that these provisions can be divided into two categories, one providing for conformity of automobiles to design standards and the other for conformity of automobiles to performance standards.

Section 206, 203(a)(3), and 207(a) fall in the first category. Section 206(a) when read with §203(a)(1) gives EPA power to enforce through civil penalties conformity of the construction of certified production automobiles to the same design standards as the certified prototype. Section 207(a) gives the purchaser a similar remedy by forcing the manufacturer to warrant to him that his automobile is "designed, built, and equipped" in conformity with emissions control regulations, and that is free from defects in materials or workmanship that would cause it to cease to so conform. Finally, Section 203(a)(3) extends direct government regulations to events after the automobile leaves the manufacturer's control by prohibiting any tampering with any part of the emissions control system. It is viewed that the programs under them should cover essentially the same elements of vehicle design.

By contrast, Sections 207(b) and 207(c) were meant to cover all vehicles or categories of vehicles that failed to meet emissions standards*/ as measured by an emissions test, whether or not the failure was related to any detectable difference in construction or design. The only differences between these two sections are the testing method and the effective date. Section 207(c) was meant to authorize recall of a whole class of vehicles whenever a test of a sample showed that the class as a whole most likely did not meet standards, while §207(b) was drafted in the recognition that the means to test each car in such a class for its individual emission levels in a acceptably short period of time did not yet exist, and provided for a manufacturer's warranty of compliance with standards as measured by such a test that would take effect only after the test had been developed and put into effect.

DISCUSSION

1. Certification and Tampering

Two of the provisions at issue here, certification and the prohibition on tampering, were originally inserted into the Clean Air Act by the Motor Vehicle Air Pollution Control Act of 1965.

The form in which the certification provision was included in that statute makes clear it was meant to establish a design standard. Section 202, 79 Stat. 992-93, required the Secretary of HEW to set emission standards for automobiles, while Section 203(a)(1) forbade the sale of any new motor vehicle that did not conform to the regulations under Section 202. The language of the statute thus established a performance standard for each car sold, attended with legal penalties if it was not met. However, the manufacturer could if it wished (for certification was not compulsory) avoid this danger by having a prototype vehicle tested and certified under §206(a). Section 206(b) provided that once this had been done:

---

*/ This memo will not discuss whether the "applicable regulations" under §202 which when violated may trigger §§207(a) or 207(b) warranties or recall under §207(c) must be the same as the certification standards.

> Any new motor vehicle... sold by such manufacturer which is in all material respects substantially the same construction as the test vehicle . . . for which a certificate has been issued . . . shall for the purposes of this Act be deemed to be in conformity with the regulations issued under section 202 of this title [and the manufacturer accordingly will not be liable to penalties under §203(a)(1) even if the vehicle does not in fact meet these emission standards.]

This relationship between these two parts of the statute suggests strongly that even though the word "construction" is used to describe when a car is covered by a certificate, what is really meant is that the production cars, in order to be covered, must be built to the same design as was set forth for the prototype in the application for certification. The purpose of the certification program was to give the manufacturer assurance that its production cars would conform to legal requirements, a purpose that would be defeated if the word "construction" were interpreted to include elements of construction that the certification program did not focus on, or if the certificate did not cover cases where the "construction" of a production car differed from that of a prototype for reasons not practically within the control of the manufacturer, such as the difference in production processes between necessarily hand-built certification prototypes and mass-produced production cars. Such a reading of the present language of the Clean Air Act is also supported by the position of §206 in Part II as a whole and by policy considerations, both of which are well discussed by Norman D. Shutler in a draft memorandum dated 8/30/72, and is adopted in regulations proposed on February 26, 1973, 38 FR 5183, and now in process of final promulgation.

The Clean Air Act was amended in 1970 to make certification mandatory and to delete the language quoted from §206(b) above. However, there is no other indication of any intent to change the philosophy of the certification program, and the changes themselves can be explained quite easily. Congress knew that the simple requirement that all vehicles sold had to meet the standards was a dead letter for lack of adequate enforcement mechanisms. It accordingly changed the requirement in §203(a)(1) that all vehicles had to meet the standards to a requirement that they all had to be certified. Once certification was mandatory, there was no longer any need to encourage manufacturers to certify by providing that certification would confer certain benefits on the manufacturer who elected it, and former §206(b) was deleted accordingly.

Such a reading would indicate that Congress did not intend to change the purpose of certification, and this is in fact the interpretation EPA has adopted. Certificates since the statute was changed in 1970 have continued to state that they apply to all vehicles which are "in all material respects of substantially the same construction" as a prototype. Although this will be changed by the certification regulations proposed February 28 to coverage of all vehicles "which conform, in all material respects, to the same design specifications" as the test vehicle, no change in the scope of certification is intended.

The philosophy of the certification program is accordingly well established. Nevertheless, there is a fundamental weakness in the way it presently operates which will also affect the other design related programs at issue here. Although the certification program should be structured to establish the similarity of the design or production vehicles, in all matters affecting emissions, to the design of the prototype, EPA has no regulations specifying with particularity which parts of the vehicle are regarded as potentially affecting emissions to the extent they should be described in an application for certification, or the degree of detail with which a design should be described. This raises the possibility that a manufacturer might fail to describe or adequately describe some particular emission related component in the certification application, or more important, that it might resist a prosecution for selling uncertified cars on the ground that the difference in design between prototype and production models was too insignificant to support a prosecution. EPA would then be forced to go to the trouble and expense of proving that the given difference in design was emissions related, and to run the risk of losing the case if it could not do so.

The risk would be avoided if EPA were to publish regulations setting for specifically what the Part I Application was required to describe, and in what detail, and amending the terms of the certificate to provide that any production vehicle that did not conform to that description would be considered uncertified. It would be desirable from the enforcement standpoint to make the Part I as complete an inventory as possible of design characteristics that might cause the standards to be exceeded. This could be done in part by inviting public comment on whether the proposed regulations were such a complete inventory and modifying the final promulgation to cure any defects suggested by the comments. It would also be desirable to support the inclusion of each required description by a qualitative, and, if possible, quantitative analysis of why some possible variations in that design component might cause the standards to be exceeded.

Tampering

There is no relevant legislative history on what constitutes "tampering" within the meaning of §203(a)(3) of the Clean Air Act. By a memorandum dated August 10, 1973, this office has stated that dealer may be convicted for "tampering" even if he did not know the act for which he was prosecuted was illegal. However, it is also our opinion that the word "knowingly" does require that the defendant know that he is doing the particular act forbidden, and that for a prosecution to succeed, EPA would accordingly have to prove that the dealer knew that the work he was doing would have the effect of removing or rendering inoperative the emissions control system. See United States v. International Minerals and Chemicals Corp., 91 S. Ct. 1967, 1701 ("A person thinking he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered" by a prohibition on "knowingly" shipping such acid without following certain procedures). The easiest way to prove this would of course be to show that he specifically did the work to achieve this result, but such a showing is not necessary to a prosecution. It is enough to show that he knew that it would be a result of what he was doing.

It seems to follow from the requirement that the dealer must know he is disconnecting or rendering inoperative part of the emissions control system before he may be convicted of tampering that tampering is essentially work that would change the conformity of the vehicle to design specifications. Unless the change brought about by the work is tangible enough to show up in such a description, it would most likely be difficult to prove that the dealer knew that it would have an effect on emissions control elements of design to be described with particularity in the Part I and were to make and publicize a reasoned showing that departure from that description might well cause the vehicle to fail to meet the standards, this might make it easier to prosecute dealers who made changes that would cause that description to cease to be accurate by making the proof of knowledge easier.

If such a project is too ambitious, it would still be useful to publish a list of the acts that EPA considers to be "tampering", and why they are so considered.

2. The Warranty and Recall Provisions

The warranty and recall provisions now contained in §207 were inserted by the Clean Air Amendments of 1970, and for the most part by the Senate bill.

The only warranty contained in the House bill, which was passed first, was in §206(e), and provided that each new motor motor vehicle "shall be warranted to have systems or devices for the control or reduction of substances emitted from vehicle . . . that are substantially of the same construction as systems or devices, on test vehicles . . . for which a certified has been issued". H. R. Rep. No. 91-1146 (91st Cong., 2d Sess.)(1970) p. 40. (henceforth "House Report") This did nothing more than make the requirements of certification enforceable by private citizens under warranty as well as by EPA under the civil penalty provisions. The legislative history indicates that the notion of a performance warranty had been considered and rejected. "Because of the present unavailability of adequate, low-cost testing devices to test automobile emissions while vehicles are in actual use, the committee decided that a performance warranty would be inappropriate at this time." House Report p. 12.

By contrast, the Senate bill contained the substance of present Sections 207(b) and 207(c). Section 207(c) of the Senate bill began:

> "Every new vehicle or new vehicle engine introduced in commerce for sale or resale shall be warranted by the manufacturer to be designed, built, and equipped so as to conform with applicable regulations issued under this title, and shall further be warranted to remain in conformity with such regulations for the lifetime of such vehicles or engines if properly maintained, serviced, and operated." S. Rep. No. 91-1196, (91st Cong., 2d Sess.) (1970) p. 100 (henceforth cited "Senate Report")

The text of the report states explicitly that under this provision "The manufacturer would be required to warranty the performance of each individual vehicle as to compliance with emissions standards." Senate Report p. 29. (emphasis supplied)

Section 207(d) of the Senate bill would have provided two alternative methods of implementing this warranty--tests of individual vehicles (corresponding to present section 207(b)), and tests of a sample of vehicles to assess the performance of the class to which they belong (present section 207(c)). As the text of the report put it: "This section [section 207 of the Senate bill] would provide two methods to determine whether or not individual cars will perform to the emission standard." (emphasis supplied)

During the debate on the Senate floor, both supporters and opponents of these warranty provisions recognized that they established a performance standard, as opposed to a design standard, and some of them suggested a materials and workmanship warranty would be preferable. Cong. Rec. S. 16096 (September 21, 1970)(Sen. Boggs); S. 16233-34 (September 22, 1970)(dialogue of Sen. Muskie and Sen. Griffin)

The Conference Report adopted (with some changes) the Senate version of these two provisions.

> The Senate amendment required . . . that manufacturers warrant that vehicles . . . will conform with applicable emissions standards throughout their useful life (set at 5 years or 50,000 miles) if maintenance and certain other requirements are met. . . . The conference substitute adopts substantially the provisions of the Senate amendment relating to compliance after sale and warranty. H.R. Rep. No. 91-1783 (91st Cong., 2d Sess.) (1970)(p. 50)

The legislative history therefore indicates that both §207(b) and §207(c) were meant to be triggered by emissions performance alone.

The present language of Section 207(c) is completely consistent with this legislative history. However, the first sentence of §207(b)(2) only requires the manufacturer to warrant the "emission control device or system," not the performance of the vehicle per se. It might be argued on the basis of this phrase that the §207(b) warranty was not triggered when a car failed the relevant emissions test for reasons not connected with the performance of the "emissions control device or system".

Although this is a possible argument, we regard it as weak, and very likely to be rejected by a court in favor of the view that §207(b) looks to vehicle performance alone. As already noted, this is the message of the legislative history. It is also the only reading that makes sense from a policy viewpoint. The objective of §207(b) warranty is to help clean up the air by encouraging manufacturers to build cars that meet the emissions standards in practice, Cong. Rec. S. 20601 (Dec. 18, 1970) (Muskie). This purpose would not be served if manufacturers were relieved of warranty responsibility for a certain category of defects that caused the standards to be exceeded.

The present structure of §207 also provides support for the notion that §207(b) was meant to be a pure performance warranty. Sections 207(a) and (c) are both keyed in different ways to the ability of the car to meet the standards. If §207(b) were restricted to the "emissions control device or systems", it would be entirely possible for a car to be the object of a valid claim under the §207(a) warranty and subject to recall under §207(c), but still not in violation of §207(b) warranty requirements. Such a result is paradoxical enough to suggest that Congress did not intend it.

Finally, and most important, every part of §207(b) except for the reference to the "emissions control device or system" is worded in terms of a pure performance standard. The warranty does not become effective until a test is available to determine whether any vehicle "complies with the emissions standards of [the regulations under Section 202]". The reference to the "emissions control device or system" is contained in a sentence that merely sets forth a general description of what must be warranted; the next sentence, which describes with particularity what the warranty must actually provide, is worded purely in terms of emissions performance, and states that the warranty applies if the vehicle "fails to conform at any time during its useful life (as determined under section 202(d)) to the regulations [including emissions standards] prescribed under section 202."

Section 207(a)

Section 207(a) appears for the first time in the conference version of the 1970 amendments, and the only reference to it in the legislative history states "In addition to the performance warranty, the conference substitute calls for a defect warranty for materials and workmanship". Conference Report p. 51.

Despite this lack of legislative background, it is a reasonable interpretation of the statute to conclude that the determination of when the §207(a) warranty applies was not meant to be made on the basis of whether the vehicle in question actually failed an emissions test. The legislative history of §207(b) shows at every point that Congress was well aware of the difficulties of developing an emissions test that would be short enough to be useful in enforcing an individual-vehicle warranty and also knew that a substantial time would pass before it could be in effect, yet the §207(a) warranty was made effective almost immediately upon passage of the 1970 amendments. Congress would not have done this unless it had contemplated that claims could be made and compelled to be honored under the warranty as soon as it became effective and before a test had been developed. */

The question then is how, in the absence of an emissions test, a purchaser is to show that a vehicle "fails to conform with applicable emissions control regulations." It seems that the only possible answer is that the defect must affect the conformity of the vehicle to emissions-related design specifications.

This seems dictated both by logic and by the structure of the statute. If a warranty is to be triggered by the conformity of an individual vehicle to the standards, and there is no test available to determine conformity, the only logically possible way that conformity could be determined would be by establishing a list of individual departures from design and construction specifications that by themselves were known from experience to be enough to cause non-conformity. That this reading was intended by Congress is supported by the Congressional establishment of a certification program, the sole function of which, as noted above, is to control the emissions of production cars by establishing their conformity to the design specifications of the prototype. If this is the approach Congress has chosen to control emissions from new cars, it would be a simple extension of the practice, and no departure in policy, to establish the same approach to §207(a).

This view in turn suggests that the §207(a) warranty should cover defects in those parts and elements of design that are required to be described in the Part I Application. If a given part or element of design affects emissions performance in regarding all vehicles that do not conform to that description as uncertified, it follows in logic that any "defect in materials or workmanship" that causes the vehicle to cease to conform to the description in the

---

*/ The Senate version of §207(b) had originally provided that the warranty would be effective ninety days after enactment of the bill, even though it was recognized that this would have no practical effect until a short test was developed. The incongruity of making a warranty effective even though no claims could be made under it led to the bill's amendment on the floor of the Senate to provide that there should be no warranty obligation until the short test had been established. Cong. Rec. S. 16235-37 (Sept. 22, 1970).

Part I should be enough to trigger the §207(A) warranty. If such an approach to §207(a) were adopted, it could of course be predicted that the industry would take special pains to examine what EPA was demanding in the Part I and to narrow its scope as much as possible.

The final question under §207(a) concerns the meaning of the phrase "defects in materials and workmanship". This is a common phrase in manufacturers' warranties, and presumably Congress meant it to have its usual meaning here.

3. Specifics

With the background given above, it is easier to answer some of the specific questions that previously asked in a memo. They are:

Question #1: Section 207(b) is limited to the "emission control device or system" and Section 203(a)(3) is limited to "any device or element of design installed on or in a [vehicle] in compliance with regulations . . ." However, neither Section 207(a) or Section 207(c) are limited to any specific parts of the vehicle by their terminology. Can these provisions of the Act be interpreted independently? Specifically, does the limited coverage of Section 207(b) and Section 203(a)(3) refer to the same parts or systems of a vehicle (or engine)? Are Sections 207(a) and Section 207(c) limited in scope of coverage to any specific emission related part or systems of a vehicle (or engine)? If Sections 207(a) and Section 207(c) are limited, are they limited to the same coverage as Section 207(b) and Section 203(a)(3)?

Answer #1: As discussed above, §207(b), despite the limited scope of some of its language, was meant to be a performance warranty pure and simple, not tied to any particular part of the vehicle. Similarly, it is the opinion that neither §207(a) nor §207(c) is limited to any particular part of the vehicle. Finally, as stated above, the governing determination in tampering prosecutions will be whether the dealer knew he was disconnecting or rendering inoperative some part of the emissions control system.

Question #2: What is the scope of the term "applicable regulations" as used in Section 207(a)(1) and (a)(2)? This term clearly includes Section 202 emissions standards. Does "applicable regulations" as used in Section 207(a)(1) include the "useful life" of a vehicle (or engine)? Does "applicable regulations" in either (a)(1) or (a)(2) include conformance with the certificate of conformity and/or prototype with maintenance regulations?

A specific problem focusing on the need to answer the above questions is whether Section 207(a)(1) or (a)(2) protects a purchaser against a defect in "design" per se such that emission standards are not exceeded when the vehicle is new, but are exceeded when the vehicle is within its "useful life". Such a design defect could exist because the vehicle did not conform with the certificate of conformity and/or prototype or despite conformance (where the prototype was improperly certified.)

If the above problem is not covered by an expansive definition of "applicable regulations" in (a)(1) or (a)(2), are such design defects covered by "defects in materials and workmanship" under (a)(2)?

A final consideration is whether, under definitions of (a)(1) and (a)(2) broad enough to cover the above problem, Section 207(a) has not really swallowed 207(b)? What is the relationship between these two subsections?

Answer #2: Since the emissions standards themselves include a definition of "useful life", conformity for that period is also encompassed in the notion of "applicable regulations". In addition, it is the opinion, as discussed above, that ideally both 207(a)(1) and (a)(2) warranties should be triggered by an omission or defect that caused a failure to conform to the design of the certification prototype, but that it may be hard to establish such a connection in the absence of evidence that a failure to so conform will in fact cause the emissions standards to be exceeded.

The term "applicable regulations", however, should not be read to cover conformity with maintenance regulations. Maintenance requirements by their nature cannot be warranted by the manufacturer, since compliance with them is at the choice of the individual motorist. Instead, they are preconditions to the liability of the manufacturer under the 207(b) warranty provision and the 207(c) recall.

If a vehicle, for whatever reason, is designed so that it is not capable of meeting standards for 50,000 miles, then it will be uncertified if it does not conform to the design specifications or the prototype. In addition, it will fail in any event to conform to the §207(a)(1) warranty. The phrase "designed, built, and equipped so as to conform at the time of sale with applicable regulations" was interpreted as meant to force the manufacturer to warrant that the vehicle is at the time of sale of a design which is capable of meeting the standards during the entire useful life of the vehicle as defined in the statute.

As noted above, the relationship between §§207(a)(2) and (b) is that the first is limited to "defects in materials and workmanship" that cause the standards to be exceeded, while the latter would also cover cars that exceeded the standards for any other reason within the control of the manufacturer, such as excessive production tolerances or gradual deterioration in control performance under the strains of normal use.

§ § § § § § §

CERTIFICATE OF CONFORMITY -- SECTION 206

TITLE: Duration of Certificate of Conformity

DATE: June 16, 1972

FACTS

Section 202 of the Clean Air Act requires that all new motor vehicles meet emissions standards established by EPA. Paragraph (a)(1) of section 206 provides that EPA shall

> test, or require to be tested..., any new new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether such vehicle or engine conforms with the regulations prescribed under section 206 of the Act. If such vehicle or engine conforms to such regulations, the Administrator shall issue a certificate of conformity upon such terms, and for such period (not in excess of one year) as he may prescribe.

It is illegal to sell any new motor vehicle of a model that is not covered by a certificate.

Certificates as originally issued by EPA are valid for 365 days. However, the Office of Air Programs determined last February that, for a number of important policy reasons, the Agency would continue in 1972 its past practice of issuing renewals for its certificates of conformity which would allow the manufacturer to continue to produce vehicles beyond the 365-day period for which the original certificate had been issued, but no later than December 31.

An attorney in the Air Division of the General Counsel's Office advised the Program that this decision appeared to be contrary to section 206(a) as amended by the Clean Air Amendments of 1970, and you have asked me to re-examine this matter.

QUESTION

Does the reference in section 206(a)(1) to the issuance of certificates for a period "...not in excess of one year" refer to a model year or to a period of 365 consecutive days?

ANSWER

While the meaning of the language is far from clear, it is concluded that the reference is to a "model year" and that renewal of certificates is appropriate for 1972 and also for successive years. A contrary conclusion would appear to be highly disruptive to production in the automobile industry, and it is unlikely that Congress would have intended such a result.

DISCUSSION

1. The meaning of the phrase "not in excess of one year" in section 206(a) can only be gleaned by considering the background of industry and regulatory practice prior to adoption of the 1970 amendments to the Clean Air Act. While it is

true that most models are produced for approximately one year, the general practice of the automobile industry was and is to produce many of its models for more than 12 months. This practice permits early introduction of some models and permits manufacturers to fill orders placed late in the model year.

2. The practice of the motor vehicle program--then located in NAPCA in HEW--was to issue an original certificate of conformity for a 365-day period, but to grant renewals of any such certificate at the request of a manufacturer, so long as the renewal certificate did not extend beyond December 31. This practice was well-known throughout industry, in NAPCA and to the Congress, and was of unquestionable legality under the language of the Clean Air Act as it then stood, which required certificates to be issued for a period "not less than one year."

3. When Congress adopted the "Clean Air Amendments of 1970," it modified section 206(a) of the Act to provide that no certificate may issue for a period in excess of one year. However, there is no other indication in the language of section 206(a), or any other provision of the Act, or in its legislative history, that Congress intended to revise the prior practice.

4. In fact, the language of the Act and the legislative history strongly suggest that Congress intended to sanction model year production for longer than one year, so long as it did not extend beyond December 31 of the corresponding year calendar year.

Under section 206(a) of the Act, the Administrator is required to issue a certificate of conformity for any vehicle or engine which he tests and determines conforms to regulations "prescribed under section 202 of this Act." These regulations establish emission standards for new motor vehicles manufactured during a specific "model year." The term "model year" is defined in section 202(b)(3)(A)(i) of the Act:

> The term 'model year' with reference to any specific calendar year means the manufacturer's annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term 'model year' shall mean the calendar year.

By defining "model year" in terms of the individual manufacturers' "annual production period," Congress explicitly gave the individual manufacturer some control over the meaning of that term. It must have done so with the knowledge that the "annual production period" to which it referred had often exceeded 365 days in the past for a variety of good business reasons, and that there was no reason to think this would not be true in the future.

Even if this knowledge of industry practice is put aside, a literal reading of the language in question suggests that a "model year" is not limited to 365 days. The term "production period" in itself suggests a variable period, and the only provision in the statute that could be read as setting a firm 365-day upper limit to it is the prefix "annual." However, if Congress meant to set such a limit it would have been so easy to do it explicitly by writing "365-day" where "annual" now stands that their failure to do this suggests that something else was meant. What that was is indicated by the provision that each model year must include a January 1. The term "annual" can be read as underlining the point that it may not contain more than one of them.

If a "model year" may be more than 365 days, then a manufacturer in some circumstances may produce a vehicle for more than twelve months without being subject to the next year's emissions standards. To argue in the circumstances that certification may not be extended leads to the conclusion that, although vehicles produced after the end of a calendar year may conform to all the emissions control requirements of the Clean Air Act, they may not be sold because they may not be certified. Since the only purpose of certification is to show that all applicable emissions standards are met, the argument is not persuasive.

5. One possible argument in favor of limiting the production period to 365 consecutive days is that a 365-day limit on any model year's production must be implied in order to prevent circumvention of the effective date of the emission standards prescribed under section 202.

The short answer to this argument is that the authority to issue a renewal is not equivalent to the duty to do so. Consequently, the Congress left the Administrator with ample administrative discretion to refuse to grant unjustified renewals.

In addition, the provision that each model year must include the January 1 of the calendar year it corresponds to will limit total slippage over the life of the statute to the four-month difference between August and December. */

6. In this regard, it may be noted that construing section 206(a) to limit production for any given model year to 365 days might in certain instances have a counter-productive effect on air quality. Such a construction would effectively prevent the early introduction of cleaner vehicles, and thus encourage the sale and use of dirtier vehicles. For example (and this has happened), if a manufacturer were to introduce one of its 1974 models in April 1973 (rather than in September), this interpretation would mean the vehicle could not be produced after April 1974 unless it met the 1975 standards as well. Since manufacturers would refuse to be put in this position, early introduction (and production) of vehicles would not occur.

7. Despite determination that the natural and constructive interpretation of the phrase in question is that it refers to a "model year" and not to a 365-day year, an opposite result could be reached in light of Congress' change in the language from requiring that a certificate be issued for "at least one year" to requiring that it be issued for a period "not to exceed one year." Even approaching the matter from a strict-construction point of view, however, an opposite result is not inevitable.

---

*/ The legislative history of the 1970 amendments indicates that Congress expected that the effective date of the 1975 standards might be as late as January 1, 1975. Since on present schedules the production of 1975 models would start in August 1974, the only way short of shutting down the industry that the Administrator can be authorized to give the four extra months the statute contemplates he may find to be justified is to allow him to certify models produced in prior years for more than twelve months.

An alternative purpose for the language change may be found. Under the 1967 Act, there was no assurance that the Air Program would review each model year's vehicles to determine compliance with the standards. A certificate might have been issued for 2, 3, or 4 years' prospective production. Since a certificate of conformity was made mandatory under the 1970 amendments, Congress simply may have intended to insure EPA review whenever a new model was introduced. Given this alternative purpose, section 206(a) need not be construed to require compliance with the emission standards for the next model year after 365 days of production.

8. In conclusion, after analysis and a balancing of the above factors, it is concluded that the word "year" in section 206(a)(1) should be interpreted--in 1972 and in successive years--as a "model year" of approximately 365 days and that accordingly, renewals may be issued as they have been in the past.

§ § § § § § §

TITLE: Certification of Vehicles for Sale at High Altitudes

DATE: January 11, 1973

MEMORANDUM OF LAW

FACTS

MSPC has lately investigated the effects of altitude upon emissions from new motor vehicles, and has concluded that vehicles covered by certificates issued for test vehicles certified at the Ann Arbor, Michigan altitude emit in excess of the standards when operated at high altitudes, i.e., above 2500 feet. The automobile manufacturers apparently do not contest this conclusion. A memorandum of November 29, 1972 indicates that MSPC is considering requiring that the three percent of new motor vehicles which are sold at high altitudes be certified in compliance with applicable standards at those altitudes.

In terms of certification testing procedures, manufacturers would be required to submit high altitude test results on emission data vehicles only. No durability vehicles would be required because it is assumed that the slope of the deterioration curve on durability vehicles run in Michigan would be applicable, although the absolute values would be different.

MSPC has determined that manufacturers would have to change calibrations and/or make some minor hardware changes in order to demonstrate compliance at high altitudes. Vehicles calibrated to comply at high altitudes could not be expected to comply at low altitudes, unless manufacturers develop and install self-compensating devices which would make the necessary calibration changes as altitude changes.

Finally, MSPC has apparently concluded that drive-ability problems with vehicles calibrated for high altitudes would generally induce the vehicle owner to obtain necessary calibration adjustments for continued operation at low altitudes.

QUESTION #1

May EPA require that automobile manufacturers obtain separate certification of conformity with Federal emission standards for those vehicles destined for initial retail sale in high altitudes areas?

ANSWER #1

Yes. The Agency has latitude under §§202 and 206 of the Clean Air Act to determine that unique circumstances affecting emissions compel the certification of this sub-class of motor vehicles in a manner different from other vehicles in the same general class sold at low altitudes, and to prescribe regulations requiring such certification.

QUESTION #2

Does the Clean Air Act require or authorize EPA to require that vehicles certified to be in compliance with applicable emission standards at high altitudes also be certified in compliance with those standards at Ann Arbor, Michigan or some other low altitude location?

ANSWER #2

The Act includes no such requirement but we conclude that there is discretion in the Administrator to impose the requirement. If vehicles are not required to be certified at both low and high altitudes, it appears that EPA would have to assure that manufacturers set out in their maintenance instructions to the purchaser whatever adjustments are necessary to keep the high altitude vehicle's emission control system functioning properly at low altitudes.

QUESTION #3

What is the legal significance of separate certification of high altitude vehicles with respect to testing programs for recall under §207(c) of the Clean Air Act?

ANSWER #3

EPA could include high altitude vehicles transferred to low altitude in a recall program if, prior to testing the vehicles, they are adjusted to the calibrations which the manufacturer used in certifying the low altitude versions of the vehicles.

DISCUSSION

1. The relevant standard-setting and certification authority for new motor vehicles is set forth in §§202(a) and 206(a) as follows:

> [§202(a)] (1) The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . .

> [§206(a)] (1) The Administrator shall test, or require to be tested in such manner as he deems appropriate, any new motor vehicle . . . to determine whether such vehicle conforms with the regulations prescribed under section 202 of this Act.

The grants of discretionary authority in these sections are clearly quite broad. Read together, these provisions provide the Administrator the power to prescribe certification testing requirements which he deems appropriate for the emission characteristics of new motor vehicles which have some unique configuration or usage, even though the requirements may differ from those applied to other vehicles of the same general class, e.g., other gasoline-powered light duty vehicles. Precedent has been established for the exercise of this authority in the case of off-road utility vehicles, a sub-class of light duty vehicles recognized by the Agency as having peculiar difficulties with control of certain emissions sufficient to justify a temporary special standard for those emissions. In the case of vehicles destined for sale at high altitudes, the application of special test requirements is wholly consistent with Congressional intent that new vehicles manufactured for sale anywhere in the nation, except in California, should be built to achieve an identical level of emission control.

2. There is no express requirement in the Act that vehicles certified under one set of conditions must also be certified under other conditions. While §202(a)(1) provides that new motor vehicle emission standards prescribed by EPA ". . . shall be applicable to such vehicles . . . for their useful life . . . "*/ We do not think that this may properly be read as an implied requirement of dual certification, since it may be assumed that the Congress did not consider the issue and since there are provisions in the Act which relate to the useful life stipulation. Specifically, §207's provisions on warranties, recall, and maintenance instructions are designed to insure compliance by vehicles in use.

3. EPA may determine that the §207 provisions will not provide adequate assurance that vehicles manufactured to comply with standards at high altitudes will continue to comply when driven at low altitudes. For example, even if manufacturers provided owners with maintenance instructions specifying the adjustments necessary to deal with such altitude changes, this would provide only limited assurance that the necessary adjustments would be made. Presumably, only if the additional factors of adverse driveability and/or State vehicle emission testing programs are present will vehicle owners be motivated to obtain the maintenance prescribed. State testing programs appear to be unlikely in the near future. MSPC's draft paper "High Altitude Modifications" indicates that substantial difference of opinion exists among the manufacturers as to whether driveability and, consequently emission control, of high altitude calibrated vehicles is significantly adversely affected at low altitude. It is believed that EPA has the authority under §206 to require that vehicles be certified at low as well as high altitude, based upon its determination that manufacture of the vehicles with altitude compensating devices is necessary to insure their continuing compliance.

4. Assuming that EPA does not require dual certification of the high altitude vehicles, the maintenance and use instructions under §207(c)(3) are of special significance.

It is the opinion that the proper discharge of EPA's responsibilities under that section would include EPA's requiring that "necessary" maintenance and use instructions contain adjustments necessary for proper low altitude functioning of the emission controls. Logically, maintenance instructions for low altitude vehicles should also be required to specify necessary adjustments for proper high altitude functioning of controls.

---

*/ "Useful life" is defined by §202(d) to mean, for light duty vehicles, five years or 50,000 miles, whichever occurs first.

TITLE: Availability of Lead-Free Gasoline to Independent Retail Marketers

DATE: July 19, 1972

MEMORANDUM OF LAW

FACTS

The Agency's proposed regulations of February 23, 1972 would require retail gasoline stations of average and above-average size to market at least one grade of lead-free, 91 octane (RON) gasoline, beginning July 1, 1974. This regulation is designed to provide for general availability of the lead-free gasoline that will be required by 1975 model year light duty motor vehicles which will be equipped with catalytic emission control systems. Total demand for this type of gasoline, will of course increase as catalyst equipped vehicles become a larger percentage of in-use vehicles. Initially, however, widespread "demand" for lead-free gasoline will have been created by EPA's regulation. 1/

The Society of Independent Gasoline Marketers of America (SIGMA) complains strenuously that as major refiners begin to upgrade refinery capacity to produce large quantities of unleaded gasoline, all unleaded production will be utilized in these refiners' own marketing chains or in those of other majors (on a product exchange basis). They contend that since the majors now sell to them only their excess production of gasoline, they will be cut off from all supplies of unleaded gasoline during whatever period is necessary for the majors to complete the refinery conversion for lead-free gasoline production. The independent retailers, therefore, urge the Agency to provide by regulation that, beginning in mid-1974, major refiners set aside for sale to independent retail marketers (as a class) that portion of each refinery's lead-free gasoline production which equals the percentage of that refinery's total gasoline production sold to such marketers during the 1972-1974 period. If EPA does not take this action, they assert, virtually all independent retailers will be forced out of business as a result of our regulation.

QUESTION

Does the Clean Air Act provide the Administrator authority to require major refiners to make available a portion of their lead-free gasoline for sale to independent retail marketers?

ANSWER

No such express authority is provided by the Act. Implied authority to impose such a regulation could be found only with respect to a marketing area where EPA determines that insuring general availability of lead-free gasoline is dependent upon guaranteed accessibility to that product by independent retailers. 2/

1/ In a broader sense, the demand for lead-free gasoline has been created by EPA's stringent motor vehicle emission regulations for 1975-76, which were required by §202(b) of the Clean Air Act.

2/ A legally supportable approach to alleviate the adverse effect of the proposed regulation is outlined in the DISCUSSION section below.

DISCUSSION

1. The relevant statutory language appears in §211(c)(1), as follows:

> "The Administrator may . . . by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine . . . if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system . . . ."

Pursuant to this authority, the Administrator has proposed the regulations to which the independent retailers object. The regulations would "control" the availability of lead-free gasoline at retail service stations in order to insure that owners of catalyst-equipped vehicles would have ready access to a fuel which would not harm the catalyst. 3/ The independent retailers argue that if EPA has the power to provide by regulation for general availability of lead-free gasoline at retail outlets, it is also empowered to provide for general availability of lead-free gasoline to retail outlets. 4/

2. As stated in January 17, 1972 memorandum, any control imposed pursuant to §211(c)(1) must be designed to effectuate the legislative purpose of preventing endangerment to health or welfare or impairment of emission control devices, and must be reasonably necessary to carry out that objective. Here EPA is concerned only with the protection of emission controls and the general availability of lead-free gasoline necessary to assure that protection. Accordingly, the only situation in which EPA can conceive of the regulation proposed by SIGMA being legally supportable under §211 is where the guaranteed availability of lead-free gasoline at independent retailers (above the minimum size specified in the proposal) in a given retail marketing area would be determined by EPA to be essential to the goal of general availability of that product in that area. The proposal itself suggests that this determination has already been made with respect to all geographic areas of the country, but our information is that it has not been made for any area. 5/ To EPA's knowledge, no one has presented information demonstrating that the accomplishment of general availability of lead-free gasoline will be compromised in any area if independent retailers there do not have supplies of that gasoline beginning July 1, 1974.

3. It appears that a legally supportable basis for dealing with the concerns of independent retailers is to provide for exemptions from or postponements of the lead-free marketing requirement in the regulations. A general exemption or postponement could be prescribed for a defined class of marketers. Alternatively, the Agency could provide that a retail marketer who demonstrates to the Administrator that lead-free gasoline is generally available in his marketing area and/or that he is unable to obtain necessary supplies of lead-free gasoline could be granted a postponement of or exemption from the lead-free

---

3/ As discussed in memorandum of January 17, 1972, this type of "control" was expressly approved by the Senate Public Works Committee when it reported §211, inter alia, to the Senate.

4/ Although SIGMA is represented by counsel, no legal arguments in support of this proposition have been submitted.

5/ Independent retailers apparently account for only 7 to 10 percent of the annual volume of gasoline sales nationally.

marketing requirement. As the percentage of in-use vehicles which are catalyst-equipped increases after 1975, market demand would probably force such retailers to obtain stocks of lead-free gasoline or cease doing business, but presumably the refinery capacity of major refiners would by that time have progressed to the point that excess refining stock of lead-free gasolines should be available to independents, just as leaded gasolines are now. In essence, this approach would attempt to return the independent retailers to the supply situation they are now in. Admittedly, independent retailers under an exemption would still face the problem of lack of supply from mid-1974 until refinery capacity reaches levels of excess production of unleaded gasoline, a period of time which would vary with the refineries involved.

§ § § § § § §

TITLE: Exportation of Vehicles to Canada (Section 203)

DATE: July 31, 1972

MEMORANDUM OF LAW

FACTS

Ford Motor Company wishes to export light duty motor vehicles to Canada without having obtained EPA certification that they conform to U. S. motor vehicle emission standards. Canada has its own regulatory program governing automobile emissions. Its standards and test procedures appear to be identical to EPA's, except that it has not adopted emission standards or test procedures for oxides of nitrogens. Ford maintains that, under the Clean Air Act, this difference in the two countries' regulatory programs permits them to export to Canada without first receiving certification of conformity by EPA.

QUESTION

Does the Clean Air Act subject domestically-manufactured motor vehicles to EPA emission standards if the country to which the vehicles are to be exported has motor vehicle emission standards in effect which differ from those of EPA?

ANSWER

No. So long as the country of destination has standards or test procedures for a given year or model year which differ in any respect from EPA's standards or test procedures for that year, the vehicles are not subject to the standards and certification requirements of the Clean Air Act.

DISCUSSION

1. The relevant statutory language appears in §203(b)(3) of the Act, as follows:

> A new motor vehicle or new motor vehicle engine intended solely for export, and so labeled or tagged on the outside of the container and on the vehicle or engine itself, shall be subject to the provisions of

> subsection (a), except that if the country of export has emission standards which differ from the standards prescribed under subsection (a), then such vehicle or engine shall comply with the standards of such country of export. 1/

The 1965 Clean Air Act specifically exempted from emission regulations vehicles intended solely for export. In considering amendments to the Act in 1970, the House retained that exemption, but the Senate discarded it. 2/ In a memorandum of April 12, 1971, it was concluded after analysis of the legislative history of the 1970 amendments that they narrowed the existing exemption for exported vehicles, evidencing a compromise between the House and Senate bills. 3/ It was advised that the Act requires U.S. manufacturers to comply with EPA standards with respect to new motor vehicles exported to countries having no emission standards applicable to such vehicles, unless the country of destination informs the Agency that it has no such standards in effect. Vehicles to be exported to a country having emission standards identical to those prescribed under the Act must, presumably, obtain U.S. certification. 4/

2. The scope of the exception for vehicles destined for countries having emission standards which differ from EPA's is the key issue raised by Ford's request. The question is whether the Congress meant the exception to apply to all EPA standards so long as the country of destination has any standard which differs, or whether the exception is to apply only with respect to any individual standard which is different. In the case of Canada, for example, must American-made vehicles obtain certification for all EPA standards because they do not differ from Canada's, for only the NO_x standard because it is the sole differing standard, or for no EPA standards because the Canadian standards, viewed as a complete regulatory program, differ from the EPA standards package?

3. We take the view that the language in the section regarding countries with differing standards was intended to be applied broadly, to exempt from U.S. certification requirements vehicles destined for countries whose emission standards, viewed as a complete regulatory program, differ in any way from U.S. emission regulations. Under this construction, a foreign government could prescribe emission regulations suited to that country's air quality needs, which may vary greatly from U.S. needs, and American manufacturers would have to

---

1/ The second reference to "subsection (a)" must be read as meaning §202(a), since no standards are to be prescribed under §203(a).

2/ Because the Senate Committee report on the bill (Sen. Rept. No. 91-1196) stated that the amended §202 "....would be, for practical purposes, repetition of existing law...", there is reason to believe that the deletion resulted from oversight.

3/ OGC (R. Baum) to OAP (E. Tuerk) "Exportation of American made vehicles," April 12, 1971.

4/ This statement should not be taken to foreclose the possibility that EPA could legally arrange by formal agreement that the country of destination would monitor compliance with both sets of standards by American-made vehicles imported into its territory.

build vehicles for export to that country to meet one set of standards only. The alternative to this approach would involve joint EPA-foreign regulatory efforts, requiring the meshing of overlapping and possibly inconsistent regulatory programs. Such an illogical result, involving unproductive expenditure of EPA resources and the development and manufacture of vehicles with control systems not dictated by air quality needs, should not be considered the legislative intent unless Congress provided a clear directive to that effect. No such mandate is set forth in the section or its legislative history.

4. It is recommended that any determination regarding shipment of vehicles to Canada be promptly communicated to all domestic manufacturers.

§ § § § § § §

TITLE: Tampering

DATE: August 12, 1973

By a memorandum dated November 1, 1972, you have asked our opinion on three questions arising under Title II of the Clean Air Act. Two of these questions, and our answers to them, are discussed below.

QUESTION #1

Does EPA have authority to make investigative searches of dealers' premises to uncover tampering violations? If so, what procedures must be followed?

ANSWER #1

If a civil action under 204 or 205 alleging tampering has been brought, the dealer and other witnesses may be deposed and forced to produce documents and permit inspections under the Federal Rules of Civil Procedure. However, in all other cases the better legal view is that EPA has no authority to make investigatory inspections of dealers' premises or records.

QUESTION #2

What are the various procedural requirements of tampering prosecutions?

ANSWER #2

Congress has explicitly labeled the penalty imposed for tampering as "civil", and there is every reason to think the courts would uphold that classification. Accordingly, EPA would only have proved its case by a preponderance of the evidence, and the dealer would have no Fifth Amendment right to refuse testimony on the ground it might show a tampering violation. It also seems clear that the proprietor of a dealership could be held responsible for tampering by any of his employees, and that the doctrine of entrapment would not be any obstacle to effective enforcement using a "bait car".

DISCUSSION

1. Investigatory Inspections

Sections 206(c) and 208 of the Clean Air Act explicitly authorize investigatory inspections of the records and facilities of motor vehicle manufacturers. There is no similar provision authorizing inspection of the records and facilities of dealers.

The legislative history of the Clean Air Act shows that this failure to authorize inspections of dealers was not an oversight by Congress. Each of the two times Congress has passed a bill to control motor vehicle emissions, the Senate version has contained explicit authority to inspect dealers, and each time this authority has been removed from the bill in conference. Compare S. Rept. No. 192 (89th Cong., 1st Sess.)(1965) p. 24 with 70 Stat. 994 (Section 207 of the Motor Vehicle Air Pollution Control Act); compare S. Rept. No. 91-1196 (92d. Cong., 2d. Sess.)(1970) pp. 109-110 with Section 206(c) of the Clean Air Act as it now stands. Such a record of Congressional action on substantive portions of a draft bill is a particularly weighty form of legislative history. See National Automatic Laundry Council v. Schultz, 443 F.2d. 689, 706 (D.C. Cir. 1971)(Leventhal, J.)

In addition, Section 114 of the Clean Air Act confers authority on EPA to make inspections in connection with the development and enforcement of implementation plans, and EPA's other statutes contain similar grants of authority. See Section 308 of the Federal Water Pollution Control Act, as amended; Section 13 of the Noise Control Act of 1972; Section 9 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. "When Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." Alcoa Steamship Co. v. Federal Maritime Commission, 348 F. 2d. 756, 758 (D.C. Cir. 1965).

On the other hand, it is a rule of statutory construction that courts "may not 'in the absence of compelling evidence that such was Congress' intention.... prohibit administrative action imperative for the achievement of an agency's ultimate purpose.'" U.S. v Southwestern Cable Co., 88 S. Ct. 1994, 2005 (1968), quoting In re Permian Basin Area Rate Cases, 88 S. Ct. 1344, 1367 (1968). This principle could be invoked here, as the policy reasons supporting dealer inspections are plainly substantial.

Furthermore, there is some precedent for establishing investigatory inspection requirements by regulation even where the statute is silent concerning them and there is some indication of contrary legislative intent.

In two cases from the 1940's, the courts upheld a regulation promulgated by a Federal rent-control agency that required landlords to admit Federal inspectors even though the statute under which it was issued had been amended to delete an explicit authorization for such visits. Woods v. Carol Management Corp., 168 F. 2d 791 (2d. Cir. 1948) (A.N. Hand, J.)(alternate holding); Graylin Bainbridge Corporation v. Woods, 173 F. 2d. 790 (8th Cir. 1949). Partly in reliance on these cases, EPA has promulgated regulations under §211 of the Clean Air Act which not only require gas stations to make lead-free gas available, but also require them to admit EPA inspectors to check on compliance. 38 FR 1254 (January 10, 1973). No litigation challenging these regulations has yet been filed, even though the absence of an explicit provision for inspections under §211, when coupled with the presence of such a provision in other parts of the Clean Air Act, might be taken as evidence of a Congressional intention that no such power should exist where §211 was concerned. These cases would provide pretty good support for inspection regulations applicable to dealers if it were not for one procedural obstacle.

The regulations involved in each of the examples above were promulgated under authority of a statutory provision that also authorized their judicial enforcement. Section 211 of the Clean Air Act provides a civil penalty of $10,000 per day for violation of any regulations established to "control" the additive content of gasoline, while 50 App. U.S.C. 1896 allows the government to obtain injunctive relief against any violation of regulations promulgated under the rent control act involved in Carol Management - Bainbridge.

By contrast, Section 301(a) of the Clean Air Act, under which dealer inspection regulations would have to be issued, contains no similar provision for judicial enforcement. In the absence of explicit authorization, of course no penalties for violation of these regulations may be imposed. In addition, the absence of any provision for injunctive enforcement of 301(a) regulations, even though provisions for injunctive relief are contained elsewhere in the Clean Air Act, and in EPA's other statutes, once again indicates that Congress did not intend even injunctive enforcement of §301(a) regulations.

As far as injunctive relief is concerned, the argument based on legislative intent is not conclusive. In U.S. v. Republic Steel Corp., 80 S. Ct. 884, 890 (1960) the question at issue was the proper construction of the Rivers and Harbors Act of 1899. That Act forbade (a) erecting any structure in navigable waters without government permission. Criminal penalties were provided for each category of violation, but injunctive relief was only authorized against the first. Nevertheless, the Supreme Court, in a 5-4 decision, said there was an implied right of injunctive relief against the second category as well. "Congress has legislated and made its purpose clear; it has provided enough Federal law in [the rest of the statute] from which appropriate remedies may be fashioned even though they rest on inferences." The court justified its broad reading in part by what it saw as a statutory purpose to protect the environment. It reached this conclusion even though a prior version of the statute had explicitly authorized the injunction in question, and Congress had deleted that provision. United States v. Perma Paving Co., 332 F. 2d. 754 (2d. Cir. 1964) (Friendly, J.).

In Republic Steel, however, there was no dispute that the acts sought to be enjoined were illegal under the statute, and it was simply a matter of implying an additional remedy. In our case the court would not only have to imply the remedy, but would simultaneously have to find the regulation itself consistent with the statutory purpose. Though it might be argued that these are two separate questions which the court should analyze separately and without regard to each other, I think the better (and more realistic) view is that taking the regulation as a whole, we would be asking the court to stretch the statute still more than it was stretched in Republic Steel.*/ Though I cannot say, in light of the cases cited above, that this would be a hopeless undertaking, I think it would be very difficult. Inspections of business premises do contain some elements of invasion of privacy not present even in the cases cited, in which the inspectors did not enter apartments without the tenants consent and the bulk of the rest of the building was open to all tenants without restriction. In addition, the Clean Air Act is a new statute, comprehensively drafted to confer broad powers on EPA to deal with the general problem of air pollution, not an old and obscure law like the Rivers & Harbors Act. Such factors make the arguments based on legislative intent with which this memo began particularly presuasive, and my own belief is that they would prevail.

If this analysis is correct, and no administrative authority to inspect dealers for tampering violations can be implied from the statute, the only way left of using the legal process to gather information will be to gather it in the course of enforcement proceedings.

The law here is relatively straightforward. If probable cause to believe there has been a criminal violation is shown, EPA may apply for a search warrant under Federal Rules Crim. Proc. 41(b). In particular, a warrant for the seizure of evidence of a crime may be obtained.

Unfortuantely, the only criminal statute**/ that might be relevant is Section 113 of the Clean Air Act, which forbids any knowing misstatement in "any application, record, report, plan, or other document filed or required to be maintained under this Act." I do not know of any document which dealers file with EPA or are required to maintain under the Clean Air Act, and so I conclude that this provision will not be useful in obtaining information on tampering.

No such problems arise regarding Sections 204 and 205, which authorize injunctive relief and fines against tampering dealers. As discussed below, it is virtually certain that the Congressional designation of these fines as "civil" will be upheld by the courts, and it follows that the Federal Rules of Civil Procedure will apply. See Fed. R. Civ. Proc. 1, 81.

---

*/ The courts also have power, even when there is no authorizing statute at all, to issue an injunction at the request of the government to remove wide-spread obstacles to interstate commerce where emergency conditions are present, In re Debs, 15 S. Ct 900(1895), or even in some cases where they are not present, United States v. Brand Jewelers, Inc., 318 F. Supp 1293 (S.D.N.Y. 1970). I doubt that inspections of dealers for tampering violations would be viewed by the courts as falling within this principle, and even if they were, the courts would most likely not issue an injunction under this authority until they had engaged in a more detailed sifting of the individual circumstances than would be called for in the case of an injunction issued under a statute. Note, "The Statutory Injunction as an Enforcement Weapon on Federal Agencies" 57 Yale L.J. 1023-52, 1024 1026-47 (1948).

**/ Except for 18 U.S.C. §1001, which prohibits essentially the same acts in somewhat broader language.

Under these rules, a complaint need only set forth a "short and plain statement of the claim showing the the pleader is entitled to relief"; Fed. R. Civ. Proc. 8(a). Although all the facts necessary to a favorable verdict need not be summarized in the complaint this rule does require "the pleader to disclose adequate information on the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 2A Moore, Federal Practice and Procedure, p. 1608. See also Conley v Gibson, 78 S. Ct. 99 (1957).

Once the complaint had been filed, the rules would allow EPA to take the deposition of the dealer or any of his employees, to make him produce any relevant documents, and to inspect his premises, Fed. R. Civ. Proc. 26(a); 34. Since the violation is civil, the dealer would have no Constitutional right to refuse to give evidence concerning it either on deposition or at the trial.

There is one other way that information might be obtained from dealers under the Clean Air Act. Section 114 allows the Administrator to require the owner or operator of any emissions source to keep records concerning it, and allows EPA employees to enter any premises where an emissions source is located, as long as these things are done "[f]or the purpose of developing or assisting in the development of any implementation plan under Section 110 [or] of determining whether any person is in violation of any requirement of such a plan."

The term "emissions source" is not defined explicitly, but if given its usual meaning it would certainly include automobiles. Accordingly, this provision could be sued to obtain access not just to dealer's premises, but to any garage or workshop where automobiles are located. Such an authority, however, could only legitimately be exercised in AQCRs that exceed the standards for automobile-related pollutants, since only in such regions is "development" of a plan to control such pollutant necessary. In such regions it would be legitimate for EPA to inspect garages in order to determine the extent of tampering and thus whether the applicable implementation plans should be required to contain anti-tampering provisions. The information so gathered could then be used in 204 prosecutions, even though supporting such prosecutions could not legitimately be the purpose of the inspections. United States v Morton Salt Company, 338 U.S. 632, 641-42, 647-51 (1950)(Jackson, J.). In addition, it might be found advisable as the result of such a survey to require state implementation plans in these AQCRs to contain anti-tampering provision. */ If a plan contained such provisions, 114 would confer on EPA a continuing right to inspect those subject to them in order to determine compliance.

---

*/ Such a requirement would only be authorized if it was necessary to achieve or maintain air quality standards. To justify it EPA would have to show that it would probably result in emissions reductions over and above those produced by the I&M systems all these regions propose to adopt, and that these further reductions were necessary to achieve or maintain the standards. If it were clear already that this could not be shown, no inspections of dealers could be carried out under 114, since it would by extension also be clear that such inspections would not be needed to develop a plan under 110, which is their only relevant legitimate purpose.

2. Procedures in Civil Litigation

Section 205 of the Clean Air Act states explicitly that the penalties it authorizes are "civil". Such a classification by Congress will generally be upheld by the courts, expecially if the prohibition of the act in question serves a valid regulatory prupose and the act is not malum in se. Goldschmid "An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies," Report to the Administrative Conference of the United States, November 17, 1972, pp. 17-19. See also Filmon Process Corp v. Spell-Right Corp., 404 P. 2d 1351, (D.C. Cir. 1968) (Leventhal, J.)

If the case is civil, proof is of course by a preponderance of the evidence, and there is no Fifth Amendment right not to testify. The applicable search and seizure rules have been discussed above.

You have asked specifically whether the defense of "entrapment" applies in civil cases, and whether it would forbid prosecuting a dealer who had only disconnected an emissions control system because an EPA inspector posing as a customer had asked him to.

The most recent Supreme Court case on entrapment is United States V. Russell 93 S. Ct. 1637 (1973). Defendant here was suspected of the illegal manufacture of amphetamires. An under cover agent approached him and offered to supply him with a scarce and necessary raw material for this drug in return for half the finished product. A defense of entrapment was rejected, even though the agent had not only asked the defendant to commit the crime, but had himself furthered it by suppying a necessary ingredient. In rejecting it, the court reaffirmed the theory of prior cases that the entrapment defense depends on establishing that the government agent persuaded an initially unwilling defendant to break the law, as opposed to simply giving the defendant the opportunity to act out his own pre-existing disposition to break the law.

I have not found any cases on whether the defense of entrapment applies in suits to collect a civil penalty. However, the defense rests on a theory of statutory interpretation that would seem as applicable in civil as in criminal proceedings. That theory is that the law does not intend to punish those whose intent to break the law is not really their own, but is urged on them in some way by the prosecuting authorities. In any event, the entrapment defense, as defined in Russell, should not present any problems for tampering prosecutions even if it is applicable to them.

It is clear that a tampering complaint may be filed against any person or business entity which fits the definition of "manufacturer" or "dealer."

Sections 213(1) and (4) define manufacturer and dealer respecively as "any person" who engages in specified activities. Section 302(s), in turn, defines "person" to include "an individual, corporation, partnership, association, State, municipality and political subdivision of a State." Thus, EPA may file suit against any individual or business entity which fits the definition of manufacturer or dealer under Section 213(1) or (4).

The Clean Air Act only forbids the "knowing" removal or rendering inoperative of an emissions control system. In statutes denouncing offenses involving moral turpitude, use of the words "knowingly" or "willfully" generally implies a requirement of evil purpose or criminal intent. In statutes providing civil penalties for acts not in themselves wrong, this interpretation does not apply.

United States v. Illinois Control R. Co., 58 S. Ct. 533-8 (1938).

United States v. International Minerals & Chemical Corporation, 91 S. Ct. 1697 (1971).

Texas-Oklahoma Express, Inc. v. United States, 239 F. 2d 100, 103 (10th Cir. 1970).

The Illinois Central case involved a statute, similar to §205 of the Clean Air Act, which provided a civil penalty for "knowing and willful" failure to comply with the act. Tampering violations are clearly malum prohibitum, rather than malum in se. This is particularly true because only a civil penalty is imposed. Accordingly, a dealer may be penalized for "knowingly" rendering an emission control device inoperative even if he was unaware of the statute. "It is not necessary that the actor intended to break the law. It is enough that he intended the act."

American Timber & Trading Co. v. First National Bank of Oregon, 334 F. Supp. 888 (D. Org. 1971)*/ See also Morisette v. United States, 72 S. Ct 240 (1952)(Jackson, J.); United States v. Schwartz, 464 F. 2d 499, 509 (2d Cir. 1972).

Boise Dodge, Inc. v. United States, 406 F. 2d 771 (9th Cir. 1969): Inland Freight Lines v. United States, 191 F. 2d 313 (0th Cir. 1951).

It has long been established that a corporation may be criminally liable for the acts of its agents, even when a mental state such as knowledge is an element of the crime charged.

New York Central & H.R.R. Co. v. United States, 29 S. Ct. 304 (909).
United States v. A & P Trucking Company, 79 S. Ct. 203 (1958).

In our view, extension of this principle to civil rather than criminal violations presents no problems. The traditional principles of respondent superior govern, requiring that the agent's illegal conduct be (1) within the scope of his employment and (2) done for the benefit of the principal.

Standard Oil Company of Texas v. United States 307 F. 2d 120, 127 (5th cir. 1962); Steere Tank Lines, Inc. v. United States, 330 F. 2d 719, 722 (5th Cir. 1963); United States v Carter, 311 F. 2d 934, 942 (6th Cir. 1963).

---

*/ Until 1971, a different standard was applied by some courts when violations of ICC regulations were alleged. 18 U.S.C. §835 provides that a fine may be imposed if a person "knowingly violates any such regulation." specific wrongful intent and actual knowledge of the regulation were held to be required to sustain a prosecution. United States v. Chicago Express, Inc., 235 F. 2d 785 (7th Cir. 1956); St. Johnsbury Trucking Company v. United States, 220 F. 2d 393 (1st Cir. 1955). However, in United States v. International Minerals & Chemical Corp., 91 S. Ct. 1697 (1971), the Supreme Court held that knowledge of the regulation is not required. The dissent in that case agreed that such a rule would have been proper, if the statute had penalized whoever "knowingly" did a certain act (as §205 does) but argued that no one can "knowingly" violate a regulation without being aware of its existence.

If these two facts are established, the knowledge of the agent will be imputed to the corporation. It is irrelevant that the person violating the law was a subordinate employee, rather than an officer or manager.

> The business entity cannot be left free to break the law merely because its owners. . . do not personnally participate in the infraction. the treasure of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus, pressure is brought on those who own the entity to see to it that their agents abide by the law.

United States v. A & P Trucking Co., 79 S. Ct. 203, 205 (1958) Accord, *United States v. George F. Fish, Inc.*, 154 F. 2d 798, 801 (2d Cir.)(Clark, J.) *United States v. Steiner Plastics Mfg. Co.*, 231 F. 2d 149, 153 (2d Cir 1956).

Thus, a corporation or partnership which qualifies as a manufacturer or dealer may be fined civilly under Section 205 for tampering done by a mechanic, even when the shop foreman or owner had no knowledge of the employee's actions.

An extended discussion of the principles of respondant superior is not necessary here. It should be noted, however, that a corporation may be liable under a statute requiring knowledge even though it specifically instructed its employees not to do the prohibited act.

United States v. Harry L. Young & Sons, Inc. 464 F. 2d 1295 (10th Cir. 1972); *Standard Oil Company of Texas v. United States supra*, at 127.

It has been argued that partnerships cannot be held liable under statutes prohibiting "knowing" or "willful" acts if one of the partners are individually liable. The Supreme Court squarly held against this contention in *United States v. A & P Trucking Co.*, 79 S. Ct. 203 (1958). "It is elementary that such impersonal entities can be guilty of 'knowing' or 'willful' violations of regulations through the doctrine of *respondent* superior." *Id.* at 125. However, if the partners are completely free of guilt, they must not be held personally liable under such a statute *Id.* at 127. *Accord*, *Gordon v. United States*, 74 S. Ct. 434 (1954).

Finally, you have asked if EPA can take the position that any change to a certified vehicle amounts to a violation of Section 203(a)(3). Plainly not all changes will do - for example, a radio might be taken out or put in. It is true, however, that the connection between the certification program and the tampering prohibition is very close in principle. Ideally the Part I Application should describe all emissions-related components and calibrations, giving all details that might be expected to affect emissions, and should contain nothing else. If the Part I so draft were not an accurate description in every detail it touched on of the corresponding production vehicles, those vehicles would be considered uncertified. Analogously, if it were conceded by all concerned that the Part I contained only information that was significantly related to emissions, any work on a vehicle that caused it to cease to be accurately described by the Part I might well be considered to "render inoperative. . . [an] element of design installed on or in a motor vehicle. . . . in compliance with regulations under this title."

So construed, the scope of the tampering program would be exactly the same as the scope of the certification program. The only difference whould be that the tampering rules would apply at a later stage in the vehicle's life. The manufacturer would indicate to EPA by filling out standards on that particular model. The requirement that production vehicles be of the same design as the prototype would then be used to ensure that the manufacture built production vehicles in strict conformity with the Part I, and the tampering provision would be used to ensure that no manufacturer or dealer put such vehicles out of conformity after they had been built.

However, this is idealism. Regulations that simply stated that any change in a vehicle that caused it to cease to be described accurately by the Part I would be considered tampering would probably not be sustained. In the first place, there is no clearly fixed format for the Part I and no required information. Second, manufacturers or dealers might well argue that just because manufacturers are willing to take the simple step of including information in a Part I application they do not thereby concede that all the information is emissions-related to the extent that tampering prosecutions can be decided by reference to it.

To overcome these difficulties it would be necessary, if interpretative regulations detailing our view of tampering were to be issued, to present in the proposal a reasoned qualitative analysis of why certain elements of design were so vital that interference with them could be deemed tampering, supplemented if possible by quantitative analysis as well.

§ § § § § § §

TITLE: Tampering Violations Under §203(a)(3) of the Clean Air Act

DATE: August 10, 1973

MEMORANDUM OF LAW

BACKGROUND

Your memorandum of July 26, 1973, raises the situation where a vehicle owner encourages or directs a dealer to tamper with the emission control equipment on the vehicle. While the dealer is clearly prohibited under §203(a)(3) of the Clean Air Act from removing or rendering inoperative an emission control system on a vehicle once it is sold to the ultimate purchaser, the liability of the vehicle owner in the situation raised has been given little consideration.1/ The inclusion of persons other than the manufacturer and dealer within the ambit of §203(a)(3) has considerable significance for MSED's tampering enforcement activities.

1/ Although your question here was not raised directly, we advise you briefly on the point in our memorandum of March 26, 1973, to which you refer.

FACTS

Is a vehicle owner who encourages or directs an automobile dealer to remove or render inoperative an emission control device on his vehicle acting in violation of §203(a)(3) of the Clean Air Act?

ANSWER

Yes, since the "causing" of the removal or rendering inoperative by a manufacturer or dealer is also a prohibited act under §203(a)(3). However, the owner's actions must be sufficiently direct and conclusive to allow the element of causation to be proved.

DISCUSSION

The relevant statutory language is as follows:

> §203(a) The following acts and the causing thereof are prohibited. . . .
>
> (3). . . .for any manufacturer or dealer knowingly to remove or render inoperative any [emission control] device or element of design after . . . . sale and delivery to the ultimate purchaser.

As Norman D. Shutler, Director of the Mobil Source Enforcement Division, has recently pointed out this language is subject to the interpretation that the "act" referred to is tampering and that it is only the manufacturer or dealer to whom the prohibition is directed. He argued, therefore, that the "causing" language must be read as prohibiting the manufacturer or dealer from directing someone to tamper. In further support of this view, he notes that there is no provision prohibiting the vehicle owner from tampering with the emission control system himself, so it appears unlikely that the Congress would have prohibited him from causing that it be done.

Our reading of the statute differs from Dr. Shutler's in that we construe it to prohibit a manufacturer or dealer from tampering and also to prohibit any person from causing a manufacturer or dealer to tamper. We consider that the proscribed act defined by the Congress incorporated the actors of principal concern, i.e., the manufacturers and dealers.

There is support for our reading of the section in the Conference Report 2/ on the 1970 Clean Air Amendments which added the subject language. The conferees describe the amended §203 as follows:

> Section 203 generally follows the provisions of the House Bill except that prohibited acts are added relating to. . . . knowing removal of devices by the manufacturer or dealer (emphasis added).

2/ H.R. Rep. No. 1783, 91st Cong., 2d Sess. 50 (1970).

The specific identification of manufacturers and dealers does not appear to us to be consistent with a legislative purpose to extend the prohibited acts (through causation by the dealer or manufacturer) to tampering by other unspecified persons.

While it is not clear why the Congress was unwilling to extend the tampering prohibition to all persons, it may have felt that it was unnecessary or impractical to do so since presumably vehicle owners would take their cars to dealers if they wished to have a control device removed or rendered inoperative. Congressional failure to extend the prohibition to vehicle owners and other is no more understandable than their reluctance to ban tampering by independent garages and service stations.

Regarding the proof of causation, if you wish we will provide some general guidance. It is likely that each prospective case may require some research.

COMPLEX SOURCES

TITLE: Complex Sources

DATE: March 26, 1973

MEMORANDUM OF LAW

FACTS

You have requested that this office provide an opinion regarding the legal basis for a complex source provision and also provide you with some background as to exactly how this type of provision is connected with the recent *NRDC* suit on transportation controls and maintenance of national ambient air quality standards. Accordingly, the memorandum is divided into two sections. The first part discusses the legal issue and the second explains the connection between the implementation of the complex source requirement and the *NRDC* suit.

ISSUE

Does the Clean Air Act authorize EPA to require that States review the location of "complex sources"?*/

ANSWER

Not only is such a provision authorized by the Act, but in the opinion of Program personnel, is required in order to insure that ambient air quality standards are maintained.

DISCUSSION

1. Section 110 of the Clean Air Act, which sets forth the requirements for implementation plans, does not specifically require that States approve the location of any new source except those covered by new source performance standards under §111 of the Act (see §110 (a)(2)(D) and §110 (a)(4)). However, in its August 14, 1971 regulations settingforth requirements for the preparation, adoption, and submittal of implementation plans, EPA explained and interpreted the statutory requirements and added certain requirements which the Agency, based on its expertise in the field, believed were necessary to accomplish the Act's purpose. In the case of most of the requirements that were in the regulations but not specifically set forth in the Act, the legal basis was the language of §110(a) (2) (B). That paragraph requires that the plan, in addition to the emission limitations, etc., contain "*such other measures* as maybe necessary to insure. . . . "the attainment and *maintenance of the* national ambient air quality standards, "...including, but not limited to, land-use and transportation controls". [emphasis supplied]

---

*/ A complex source is generally one that generates activities which emit air pollution. It may or may not emit air pollutants itself. Examples would be shopping centers, stadiums, etc.

2. From the time of enactment of the law the Program's position was that one of the "other measures" necessary to assure the achievement and maintenance of the national standards was a provision requiring an assessment of the affect on air quality of new sources prior to the time they begin operation. If it was determined that a source would cause a violation of or interfere with attainment to a national standard, the construction and operation of that source wouldbe prohibited. This would be true even though the source might be in compliance with any specific emission regulation applicable to it. Section 51.18 of the regulations required States to have a procedure to determine whether the construction or modification of "stationary" sources would result in violations of the control strategy or interfere with attainment or maintenance of the national standards. It is the firm opinion of this office that any challenge would not have been successful provided the program could, and we believe they can, substantiate their position that there is no way to insure that ambient standards will be maintained unless some responsible agency is examining the number and location of new sources in a region.

3. The requirement of the regulations discussed above refers to "stationary sources". Although the term "stationary source" is not defined generally in the Act or in the regulations in Part 51, in §111(A)(3), for the purpose of that Section, it is defined as any building, structure, facility or installation which emits or may emit any air pollutant. The implementation plan requirement has generally been interpreted by the States, without objection by EPA, as only requiring the review of location and control design of the conventional stationary sources, i.e. power plants, steel mills, etc., i.e. those new sources, generally industrial, which, by their own operations, cause the emissions of significant amounts of pollutants. The State plans that were approved in response to this regulation had specific categories of sources which would be subject to the review procedure. Although types of sources covered by the new source review provisions varied from region to region, no State included a procedure for examining the air pollution effects of sources other that the conventional stationary source.

4. From the above discussion, we think it is apparent that the failure of EPA to require the States to review the location of sources other than the conventional stationary sources cannot be defended. The statute's requirement that the plan contain the measures necessary to achieve and maintain the standards has been interpreted by the Agency as requiring the review of the locations of a certain group of sources. There is evidence that other types of sources can have just as significant an impact on air quality. Accordingly, we have no doubt that a regulation which the Program can support as necessary to attain or maintain the national standards is authorized under §301(a) and §110 of the Act. The Agency has already expressed its views on the need for such a regulation. We see no legal basis for resisting a suit to compel EPA to expand its current requirements to include complex sources.

5. Two additional points should be made. First, included in §110(a) (2) (D) is the legal authority discussed above, is the authority to use land-use controls to meet the standards. While it is not clear whether the complex source provision should be characterized primarily as a land-use provision, to the extent that it will preclude the location of certain new sources in

certain areas, it does have an effect on the use of land. To that extent, both EPA's earlier requirement for new source review and a complex source provision are authorized by this specific provision of the Act. Second, this office does not have a clear idea of how significant this provision may be. It is our understanding that pollution levels generated by some of the complex sources may not in fact be great, and that there may not be many cases where planned activities have to be curtailed or abandoned because of this provision.

THE NRDC SUIT

Before explaining NRDC's involvement in this matter, it is necessary to examine very briefly the Agency's action with respect to the law's requirement that State plans insure that the standards be maintained. In its August regulations for the submission of plans, EPA required (§51.12) that a State's control strategy had to provide for whatever reduction in pollution was necessary for attainment and maintenance of the standards. This reduction had to include the degree of emission reduction necessary to offset emission increases that could reasonably be expected to result from projected growth of population, industrial activity, motor vehicle traffic or other factors. In reviewing the plan, it became apparent that neither the States nor EPA could meaningfully project very far into the future concerning the growth factor. Moreover they were extremely difficult questions concerning this approach. For example, for how many years would growth have to be projected? Would present emission limitations have to be based on maintenance of the standards at that date? If the State could accurately project growth, the resulting emissions, and air quality in 1990, would present emission limitations have to be set so stringently that all of that projected growth could be allowed? Neither the States nor EPA was equipped to answer these questions or to make the necessary projections. Accordingly, in its May 31 Federal Register publication approving and disapproving State plans, EPA indicated that the growth projection approach was based on many tenuous assumptions. The Agency admitted it had reviewed plans to make certain that the standards would in fact be achieved, i.e., that the growth during the next two or three years would not interfere with the achievement of the standards. It also pointed out that State and local governments should have the opportunity to plan and control growth in a manner best suited to their needs. Finally, the publication stated that, in effect, if States had failed to adequately provide for growth beyond the date for achievement of the national standards, the requirement that they prevent the construction or modification and operation of any stationary source at a location where its emissions would prevent the maintenance of the standard was sufficient to insure that the standards be maintained.

The National Resources Defense Council, Inc. (NRDC) suit was primarily aimed at EPA's actions with respect to transportation controls and two-year extensions. It also attacked our actions with respect to insuring that the national standards would be maintained. The suit was not the first time questions had been raised about the adequacy of EPA's requirements regarding the review of new sources. It had become apparent to a number of people, both inside and outside the Agency, that the "complex source" problem existed, and that by and large there was no means of controlling certain activities which might cause violations of the standards. Specifically, a group of people opposing the Hackensack, New Jersey complex had raised this problem with EPA and the State of New Jersey, and had called upon EPA to remedy the situation.

Basically, NRDC was interested in two things, both of which were argued in their brief. The first was the complex source provision. The second was the long term growth projection that States should be required to do in order to start planning measures to prevent the violation of the standards over the next 15-25 years.

The Court apparently never focused on this issue, and asked questions on it in oral argument. However, in the last paragraph of the order, the Court indicated that it recognized that there were competing contentions with respect to the plan's adequacy for maintenance of the standards. It ordered the Agency to review the maintenance provisions of all State plans. It further required that within 30 days, any plan that did not adequately provide for maintenance of the standards be disapproved. The order went on to require that where plans were disapproved, the States had to submit new plans by April 15, 1973.

It was immediately apparent that the time schedules in the order were unreasonably short. Had they been compiled with, the State would had had to prepare new implementation plans for maintenance by April 15, 1973; two months later we would had had to approve or disapprove those plans. Accordingly, we entered into discussions with NRDC's attorney. After intensive discussions we were able to convince him that his insistence on the growth projection approach was neither feasible nor productive in view of the current state of knowledge and abilities of the States and EPA. Inasmuch as the Agency had been considering the complex source provision, and because we felt that we could not legally resist the application of this type of requirement, we were able to convince NRDC to commit itself to being satisfied solely with the complex source provision. Moreover, NRDC agreed to a modification of the order, permitting EPA to propose the requirement for the complex source regulation, take comment on it, and promulgate it. This would allow States to then submit plans which contain comparable provisions for our approval instead of requiring a Federal promulgation. While still keeping time pressure on EPA, the agreement did permit both the Agency and the States to face the issue more intelligently that the original order would have allowed. As part of this agreement, EPA gave advance notice of propose rulemaking at the same time that we disapproved plans as to maintenance. This has the effect of allowing States to start reviewing their legal authority and examining their own regulations to see what might be needed after final promulgation by EPA. In all of these discussions, both the Office of Air Programs and OGC were present.

AIRCRAFT

TITLE: Applicability of Clean Air Act and Executive Order 11507 to Publicly-Owned Aircraft

DATE: February 28, 1972

MEMORANDUM OF LAW

ISSUE #1

Is the Administrator of the Environmental Protection Agency authorized by section 231 of the Clean Air Act to set emission standards applicable to emissions from aircraft or aircraft engines which are publicly-owned including aircraft engines owned and used by the military? 1/

ANSWER #1

Section 231 of the Clean Air Act does not authorize the Administrator to prescribe emission standards for publicly-owned aircraft or aircraft engines.

ISSUE #2

Does section 118 of the Clean Air Act require Federal departments and agencies to comply with State and local emission standards which are applicable to publicly-owned aircraft?

ANSWER #2

States and local governments are prohibited by section 233 of the Act from adopting or attempting to enforce any aircraft emission standards unless they are identical to Federal emission standards prescribed under section 231. Since Federal aircraft emission standard-setting authority governments are likewise precluded from prescribing emission standards applicable to public aircraft. Consequently, section 118 imposes no duty upon Federal departments and agencies owning and operating aircraft to comply with State and local aircraft emission standards.

ISSUE #3

Does Executive Order11507 require Federal departments and agencies owning and operating aircraft to comply with State and local aircraft emission standards?

1/ The memorandum does not discuss the separate issue of the duty of Federally-owned and operated aircraft to comply with State transportation controls adopted as part of an implementation plan pursuant to section 110 of the Clean Air Act.

ANSWER #3

Executive Order 11507 only requires Federal departments and agencies to comply with applicable State and local emission standards. Since section 233 effectively precludes States and local governments from applying emission standards to publicly-owned aircraft, Executive Order 11507 does not require Federally-owned and operated aircraft to comply with State and local emission standards.

DISCUSSION

1. Section 231(a)(2) of the Clean Air Act provides,

> Within 180 days after commencing [the study required under paragraph (1)], the Administrator shall publish a report of such study and investigation and shall issue proposed emission standards applicable to emissions of any air pollutant from any class or classes of aircraft or aircraft engines, which in his judgment cause or contribute to or are likely to cause or contribute to, air pollution which endangers the public health or welfare.

Paragraph (3) of subsection (a) requires the Administrator to issue final regulations within 90 days after issuance of proposed regulations.

2. On its face, the grant of authority in paragraph (2) appears broad enough to permit the application of emission standards to any type of aircraft, including publicly-owned aircraft (such as military planes), if in the judgment of the Administrator such control is necessary to protect the public health or welfare. However, the legislative history of this provision indicates that such standards may only be applied to civil (i.e.; not publicly-owned) aircraft.

> A new Part B of Title II, added by the conference agreement, provides authority for the Administrator to prescribe emission standards for civil aircraft and aircraft engines. 2/

While the Senate-passed bill would have authorized the application of Federal aircraft emission standards to military and other publicly-owned aircraft, the conferees adopted the approach of the House-passed bill, which did not include authority to prescribe emission standards for military aircraft.

3. Section 233 of the Act provides,

> No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.

2/ Congressional Record (daily ed.), December 18, 1970, S. 20602.

The effect of this provision is to limit State and local authority to prescribe aircraft emission standards to standards which are identical with the Federal standards under section 231. Since Federal emission standard-setting authority does not extend to publicly-owned aircraft, States and local governments are effectively precluded from applying emission standards to Federally-owned (and other public) aircraft.

4. Section 118 of the Act provides,

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants, shall comply with Federal, State, and interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

The import of section 118 is that Federal facilities and property must comply with applicable Federal, State, local, and interstate requirements to the same extent as any other person. However, since section 231 emission standards may not be applied to publicly-owned aircraft, section 118 imposes no requirement that military aircraft comply with Federal emission standards prescribed under section 231. [3] Likewise, since identical State and local aircraft emission standards may lawfully apply only to civil aircraft, section 118 does not require military and other publicly-owned aircraft to comply with State or local emission standards.

5. Executive Order 11507 provides in part,

> Sec. 4. Standards. (a) Heads of agencies shall ensure that all facilities under their jurisdiction are designed, operated, and maintained so as to meet the following requirements.
>
> (1) Facilities shall conform to air and water quality standards as defined in section 2(d) of this order. . . . Federal facilities shall also conform to the performance specifications provided for in this order.

Subsection 2(c) of the Order defines "facilities" to include "aircraft. . . owned by or constructed or manufactured for the purpose of leasing to the Federal Government". Subsections (d) and (e) define "air and water quality standards" and "performance specifications", respectively.

---

[3] If Congress had wanted to compel all publicly-owned aircraft or all military aircraft to comply with emission standards set by Administrator, it could and would have done so in section 231 of the Act.

(d) The term "air and water quality standards" shall mean respectively the quality standards and related plans of implementation, including emission standards, adopted, and the Federal Water Pollution Control Act, as amended, or as prescribed pursuant to section 4(b) of this order.

(e) The term "performance specifications" shall mean permissible limits of emissions, discharges or other values applicable to a particular Federal facility that would, as a minimum, provide for conformance with air and water quality standards as defined herein.

6. Apparently, Executive Order 11507 contemplated that Federally-owned aircraft (including military aircraft) would comply with applicable State emission standards designed to permit compliance with ambient air quality standards. However, the Executive Order was adopted on February 4, 1970, nearly 11 months prior to enactment of the "Clean Air Amendments of 1970". Sections 231 and 233 of the Act, as thereby amended, effectively prohibit State and local governments from applying emission standards to publicly-owned aircraft. Since the Executive Order only requires compliance with applicable emission standards, Federally-owned aircraft are not required by Executive Order 11507 to comply with State or local emission standards which are only applicable to civil aircraft.

§ § § § § § §

TITLE: Administrator's Certification: Airport and Airways Act

DATE: Ausust 1, 1972

MEMORANDUM OF LAW

FACTS

Your memorandum of May 22, 1972 raises the need for interpretation of §16(e) of the Airport and Airways Act (42 U.S.C. 1716(e)), as well as the issue of EPA's involvement in certain actions called for by that Act.

Several EPA regional offices have been asked by the Department of Transportation to certify that proposed airports, runways, or runway extensions will be located, designed, constructed and operated so as to comply with air quality standards promulgated by the Secretary of Health, Education, and Welfare. The Regions have requested guidance from your office concerning the manner in which they should respond to these requests.

QUESTION #1

Is the Agency charged with the responsibility for carrying out duties assigned to the Secretary of Health, Education, and Welfare under the Airport and Airways Act?

ANSWER #1

Yes. Section 2(a)(3) of Reorganization Plan No. 3 of 1970 (3 CFR 1970 Comp. p. 199) transferred to the Administrator of the newly-formed Environmental Protection Agency all "functions vested by law in the Secretary of Health, Education, and Welfare. . . which are administered through the Environmental Health Services, including. . . the National Air Pollution Control Administration. . ." Since all matters involving air pollution and air quality standards were administered through NAPCA, EHS, it follows that the Airport and Airways Act responsibilities were transferred to EPA.

QUESTION #2

What is the meaning of the term "air quality standards", as used in the Airport and Airways Act?

ANSWER #2

We conclude that the term refers to national ambient air quality standards and State implementation plan requirements approved or promulgated by EPA to attain and maintain those standards.

DISCUSSION

1. The Airport and Airways Act (49 U.S.C. 1701 et seq.) authorizes the Secretary of Transportation to approve and fund the construction of airport development projects by public agencies. Air quality considerations are imposed upon the Secretary by §16(e) of the Act, as follows:

> "(1) The Secretary shall not approve any project involving airport location, a major runway extension, or runway location unless the Governor of the State in which such project may be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, designed, constructed, and operated so as to comply with applicable air. . . quality standards. In any case where such standards have been promulgated by. . . the Secretary of Health, Education and Welfare, certification shall be obtained from the. . . Secretary [HEW]. Notice of certification or of refusal to certify shall be provided within sixty days after the project application is received by the Secretary.
>
> (2) The Secretary shall condition approval of any such project application on compliance during construction and operation with applicable air. . . quality standards." (emphasis added)

The underscored term "air quality standards" is not defined in the Act or its legislative history, but it is the term which was used in §108 of the Clean Air Act in effect at the time §16(e) was enacted on May 21, 1970. 1/ Subsequent to that date, the Clean Air Act was amended and the term "air quality" was no longer used. The questions regarding construction of §16(e), therefore, are (1) Was the term "air quality standards" intended to have the meaning given it in §108 of the Clean Air Act? (2) What was the effect of the 1970 amendment of the Clean Air Act upon the requirements of §16(e)?

2. The Clean Air Act, until amended December 31, 1970, provided that States should adopt ambient air quality standards for various air pollutants, and implementation plans adequate to achieve and maintain those standards. These standards and plans were subject to approval by the Secretary of Health, Education, and Welfare and, where either was not approvable, the Secretary was to promulgate substitute ambient air quality standards or implementation plans necessary to protect public health and welfare. The combination of ambient air quality standards and pertinent implementation plans, whether they were adopted by a State and approved by the Secretary or promulgated by the Secretary, constituted the applicable "air quality standards" for the region involved. From the context in which "air quality standards" was used in the Airport and Airways Act, it is relatively clear that the Congress was referencing the standard-setting and implementation scheme of the Clean Air Act. Moreover, since there is no indication present that any other meaning was intended, it is consistent with established principles of statutory construction to conclude that legislative adoption of a previously-used term was intended.

Under the program so established, the Secretary of Transportation would have sought certification of compliance from the Governor of the State with respect to any approved ambient air standards and from the Secretary of HEW with respect to promulgated ambient air standards. The same procedure would have pertained regarding implementation plan requirements.

3. With the enactment of the Clean Air Act Amendments on December 31, 1970, the existing approach of attaining ambient air quality standards by means of State implementation plans was not altered, but the emphasis was changed to the extent that the amended statute provided for Federal adoption of ambient air quality standards having national applicability. The Airport and Airways Act was not amended to reflect this change. However, the change does no violence to the legislative purpose as evidenced in §16(e) and discussed above. Examining the two laws together, we find no reason to conclude from the language of either act or its legislative history that any fundamental change in the certification scheme was intended or should be found as a matter of necessary implication.

4. The effect of the Clean Air Act amendment is to require the Secretary of Transportation to in all cases look to the Administrator for certification regarding compliance with national ambient quality standards. With respect to implementation plans, the certification procedure is unchanged.

5. We are available to discuss with you and regional personnel the application of our conclusions to individual cases.

1/ The popular name of the 1967 amendments to the Clean Air Act was the "Air Quality Act of 1967".

FUEL AND FUEL ADDITIVES

TITLE: Authority to Regulate Fuels and Fuel Additives

DATE: April 30, 1970

QUESTIONS

1. Pursuant to Section 211 of the Clean Air Act, may the Administrator require the registration of fuels other than those intended for use in motor vehicles.

2. Does Section 211, or any other section of the Clean Air Act, permit the Administrator to regulate and/or prohibit the manufacture of fuels and additives other than those intended for use in a motor vehicle?

ANSWERS

1. The Administrator is authorized to require the registration, prior to sale or introduction into commerce, of all fuels or additives without regard to their intended use.

2. Neither Section 211 nor any other section of the Clean Air Act authorizes the direct regulation of the composition or sale of fuels other than those manufactured for use in motor vehicles. The Clean Air Amendments of 1973 provided the Administrator certain authority under the Federal Aviation Act of 1958 (49 U.S.C. 1421) to make determinations relevant to aviation fuel standards to be prescribed by the FAA.

DISCUSSION

The 1967 Clean Air Act contained authority to register fuels, including "fuels used for purposes other than motor fuels" (Section 210). This provision was retained in the House version of the 1970 Act, together with expanded powers as to the regulation of fuels. The Senate bill, in Section 212, recited that the Administrator could "designate any fuel or fuels for use in vehicles and engines" for purposes of requiring registration. However, the Senate report raised a question as to whether the Senate intended to limit the registration authority to motor vehicle fuels. While in the "Discussion of Intent" (pg. 33), the report states that "under the procedure that would be established by the Committee bill, the Secretary could require the registration of any fuel that is used for vehicles" (emphasis supplied), in the report's "Section by Section Analysis" (pg. 64), it is stated that the new section "continues the present provisions of Section 210 of the Clean Air Act concerning the registration of fuels and fuel additives." 1/ Any doubt raised by the Senate bill and report was resolved in the law as enacted. Section 211(a) of the Act provided without qualification that "the Administrator may . . . designate any fuel or fuel additive. . . ."

1/ There is additional confusion in the Senate report in that contrary to the quoted phrase, the bill itself did not authorize the registration of additives.

The conference report, in its discussion of the registration authority, provides, "existing provisions of the law relating to registration of fuels and fuel additives are retained with some revisions." The revisions referred to are changes in the Administrator's authority to obtain information. Had the conferees intended to limit the registration provision to motor vehicle fuels, it would only have been necessary to adopt the Senate language. Accordingly, the basic authority remains that contained in the '67 Act, viz, the authority to require the registration of all types of fuels.

The legislative history which was reviewed to respond to your first question reveals nothing that would cast doubt on the clear meaning of Section 211(c)(1) which authorizes only the regulation of fuels or additives "for use in a motor vehicle or motor vehicle engine." While the House bill apparently did extend the Administrator's regulatory to fuels other than those used in motor vehicles, there is no question that the conference decided to limit the Administrator's authority to controlling or prohibiting the manufacture or sale of "any motor vehicle fuel or fuel additive." Moreover, there is no other authority in the Clean Air Act under which the Administrator could directly regulate the manufacture or content of other fuels or additives. While the promulgation of standards both by the Federal Government and by States, as part of their implementation plans, may have the effect of regulating fuel composition, the Administrator may not directly prescribe such prohibitions or limitations, unless and until further legislative authority is granted.

In the same memorandum in which the 2 questions discussed above are asked, you inquire as to the scope of the authority of the Administrator to require manufacturers to conduct tests or research regarding emissions of their effects on public health or welfare. This is a more complicated question that has been previously asked by another component of APCO within the next week.

§ § § § § § §

TITLE: Registration and Regulation of Fuels and Fuel Additives

DATE: September 23, 1971

FACTS

1. Section 211 of the Clean Air Act authorizes the Administrator to register all fuels and fuel additives and to regulate motor vehicle fuels and fuel additives. As part of the registration process (section 211(b)), the Administrator may require a fuel or additive manufacturer to submit certain information regarding a fuel or additive, including information on emissions resulting from use of an additive in a fuel. OAP proposed that EPA, by regulation, require fuel or additive manufacturers seeking registration requirements will necessitate research and testing by the manufacturers.

2. Under Section 211, the Administrator may regulate motor vehicle fuels and additives either on the basis that their emission products endanger public health or welfare, or if their emission products impair the performance of motor vehicle emission control systems. In promulgating regulations on the former basis, the Administrator must consider relevant medical and scientific evidence, including alternative approaches to "achieving emission standards under section 202" of the Act.

QUESTIONS

1. Under section 211(b)(2), may the Administrator require from fuel and additive manufacturers information on emissions and emissions effects, resulting from the use of fuels and additives, where such requirements may necessitate development of data by the manufacturer through research and testing?

2. Pursuant to section 211(c)(2)(A), must the Administrator promulgate a motor vehicle emission standard for a pollutant under section 202 of the Act as a prerequisite to controlling or limiting by regulation any component of a fuel or additive whose use results in the production of that pollutant?

ANSWERS

1. Section 211(b)( ) will support requirements, as a part of the registration process, that fuel or additive manufacturers develop and supply to the Administrator information on the emissions and the effects on motor vehicle emission control performance and on public health and welfare which result from the use of the fuel or additive to be registered, where such requirements do not necessitate research or testing by the manufacturers involving test methods and procedures which are not already established and generally accepted in the scientific community.

2. Section 211(c)(2)(A) does not require the Administrator to adopt a motor vehicle emission standard for a pollutant as a prerequisit to promulgate a fuel or fuel additive regulation for the purpose of controlling the pollutant. Instead, it requires the Administrator to consider the relative technological and economic feasibility of alternate approaches to the desired control of a specific emission product. A requirement that the Agency first promulgate an emission standard requiring motor vehicle manufactuires to design, develop, and construct control systems or devices, and only then consider whether the emission limitation could more efficaciously be achieved by fuel or fuel additive regulation would establish an inverse regulatory scheme which is impractical and unreasonable.

DISCUSSION

The subject of the first Question was the source of a major confrontation between the Department of Health, Education, and Welfare and the members of the American Petroleum Institute and the Manufacturing Chemists Association. DHEW-NAPCA proposed regulations (34 F.R. 12447, July 30, 1969) for fuel additive registration which would have required fuel and additive manufacturers to develop and submit extensive information on the interaction of additives with fuels, the characteristics of emission products resulting from additive usage, and the toxicity or injurious effects of such products.

Through formal comments and in meetings with DHEW officials, API, MCA, and their members argued that the Secretary lacked authority under the 1967 Clean Air Act to promulgate the proposed information requirements. In support of their contention that Congress intended to impose only very limited information requirements on the manufacturers, API and MCA pointed to the conferees' rejection of the language of the House bill authorizing the Secretary to require manufacturers to provide ". . . such information as to the characteristics and composition of any fuel additive for any fuel as the Secretary finds necessary, and including assurance that such additional information as the Secretary may reasonably require will upon request be provided. . .", and adoption instead of the Senate bill's provisions authorizing less extensive information gathering. 1/

The latter set forth a list of required information which is virtually identical to the language now in 211(b)(1). Following extended discussion, 2/ the disputed requirements were dropped from the regulations promulgated June 13, 1970 (35 F. R. 9282), and replaced by requirements for summaries of existing information which the manufacturers possess concerning additives and their effects, which must be updated as the manufacturers develop additional information.

The Administration's bill (H. R. 15848) proposed the following amendment to remedy the apparent lack of legal authority to require the development of information:

> "For the purpose of establishing standards under section (b) [authorizing regulation of fuels and additives], the [Administrator] may require the manufacturer of any fuel or fuel additive to furnish such information as is reasonable and necessary to determine the emissions resulting from the use of the fuel of fuel additive or the effects of such use on the performance of any emission control device or system which is in general use or likely to be in general use. . . for the purpose of preventing or controlling motor vehicle emissions. . . If the information so submitted establishes that toxic emissions or emissions of unknown or uncertain toxicity result from the use of the fuel or fuel additive, the [Administrator] may require the submission within a reasonable time of such scientific data as the [Administrator] may reasonably prescribe to enable him to determine the extent to which such emissions will adversely affect the public health or welfare."

1/ A legal opinion submitted with Ethyl Corporation's comments appears to concede that the House bill's language would have authorized the proposed information requirements.

2/ In the course of these discussions, the Office of the General Council, DHEW, reassessed its earlier interpretation of section 210 on which the proposal had been based, and determined that the authority to require the information involved was not sufficiently clear to support the regulation as proposed.

This provision was intended to give the Administrator broad information gathering authority under a two-step approach: first, requiring development (if necessary) and submission of information identifying emission products, and second, requiring in appropriate instances, additional information to be developed on adverse health or welfare effects of such emission products.

The House rejected the Administration's approach, and instead authorized the Administrator, in connection with his authority to regulate fuels and additives, to require fuel, additive, and motor vehicle emissions from motor vehicles resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system". The Senate Committee on Public Works considered the Administration's bill (S. 3466, identical to H. R. 15848), and the House bill, and reported a bill (S. 4358) which contained language on information-gathering virtually identical to that of section 211 of the Act. In so doing, the Senate Committee adopted almost verbatim the Administration bill's language which authorized requiring "reasonable and necessary" information to determine emissions and effects on emission control devices, but added to those two categories, information regarding effects on public health. The Committee's bill did not follow the pattern of the Adminsitration's bill by next providing for a second step of information gathering on health and welfare effects, but provided separately in the same subsection for authority to require fuel and additive manufacturers to test to determine "potential public health effects" of fuel and additive use.

In the explanation of its bill's provisions, the Committee made this statement:

> "The bill would authorize a system under which the Secretary shall seek and receive information to assist him in determining the potential affect (sic) of a particular fuel on the public health and welfare or on operation of an emission control device." (S. Rep. No. 91-1196, p. 33)

Although the word "potential" was used, it is apparent that this statement described all of the information-gathering provisions of the section, not just the paragraph mentioned above which is limited by its terms to "potential public health effects". With respect to the language on "information. . . reasonable and necessary to determine" the emissions and their effects, the Committee said that ". . . the [Administrator] could request added information from the manufacturer on the effects of emissions and evaporation of fuel." The Committee made no mention of restricting the Administrator to requiring already developed information, as the House had done.

The only further explanation of the Senate's action in the legislative history was provided by Senator Baker, a member of the Committee, in his discussion of the bill before the full Senate:

> "The committee bill provides that any manufacturer of a vehicle fuel must. . . disclose to the Secretary, among other information, the composition of the fuel and the products of the combustion of the fuel." (116 Cong. Rec. 16110, daily ed., Sept. 21, 1970)

The conference committee, whose bill became law without amendment, adopted the informational requirements of the Senate bill, slightly rearranged, and added information on welfare effects to the list of "information. . . reasonable and necessary" to determine emissions and effects:

> "Section 211(b)(2)--
> For the purpose of registration of fuels and fuel additives, the Administrator may also require the manufacturer of any fuel or fuel additive--
> (A) to conduct tests to determine potential public health effects of such fuel or additive (including, but not limited to, carcinogenic, teratogenic, or mutagenic effects), and
> (B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of concentration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle or vehicle engine, or the extent to which such emissions affect the public health or welfare.
>
> Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential."
> [emphasis added]

The conference report provides little guidance to the conferees' assessment of the authority provided in the conference bill; it merely states that existing law on registration of fuels 3/ and additives was". . . retained with some revisions." In the "Discussion of Key Provisions" presented by the Senate conferees to the full Senate, it was noted (116 Cong. Rec. 20601, daily ed., December 18, 1970) that the conference bill provided". . . added information-gathering powers in the registration of all fuels and fuel additives." [emphasis added] Clearly, the authorization to require testing on potential health effects "added" to the authority in existing law, as it was construed by DHEW in the promulgation of the additive registration regulations on June 13. Likewise, the authority to require the submission of analytical techniques for detection and measurement of an additive in a fuel was new.

The question is whether the information-gathering authority described in the underlined portion of 211(b)(2)(B) quoted above, was also intended to expand the existing law. We conclude that it was, since the conferees did not adopt the House's language expressly limiting the Administrator to informa-

---

3/ The registration of fuels was not authorized under the 1967 Act.

tion "already developed", but instead adopted the "reasonable and necessary" 4/ language from the Administration's bill, as modified by the Senate. Moreover, since the information dealt with in the underlined language is basically that required in the "summaries of existing information" sections in the DHEW-adopted regulations, the Congress could have adopted the regulations' wording, as was done with other regulations elsewhere in the Act, to restrict the Administrator to existing data.

The approach of section 211(b)(2), evidences the Congress' recognition that certain basic information could readily be developed by test methods and procedures having general acceptance in the scientific community (e.g., ASTMO, while in the area of more esteric information concerning "potential" health effects, test procedures and research parameters are not well established or generally accepted. It was felt that the more difficult and expensive research burden should not be imposed upon the manufacturers until such time as the Administrator had prescribed specific protocols and procedures for conducting the research.

The Administrator's requirements under the fuel/additive registration regulations now being prepared must be reasonable, both in terms of the type and amount of information required and the time allowed to develop it. Accordingly, across-the-board requirements should be avoided where not appropriate. The regulations should include a provision establishing a basis for waiving certain general informational requirements where the manufacturer can demonstrate to the Administrator's satisfaction that the requirement or time limit is unreasonable or inappropriate as applied to him.

The regulations should also include a provision that, where information must be developed by a manufacturer, opportunity for consultation with the Administrator's representatives will be provided to identify methods and establish timetables for submitting the information. This would allow the registration of the fuel or additive pending information development and submission, subject to withdrawal of registration if the timetable is not met.

4/ The use of these terms indicates a broad grant of discretionary authority. "Reasonable" has been discussed in the following manner:

> "When employed to describe the means which are used to achieve a legitimate end it suggests not necessarily the best or only method, but one fairly appropriate, at least under all the circumstances, and when used in connection with legislative measures it signifies such measures as are fit and appropriate to the end in view." (75 C.J.S. Reasonable p. 635, cited in National Steel and Shipbuilding Co. v. U.S., 419 F. 2d 863, 876 (1969).

And "necessary" is defined as follows:

> "It may import absolute necessity or inevitability or it may import that which is only convenient, use appropriate, suitable, proper or conductive to the end sought." (Black's Law Dictionary, 4th Ed., 1951).

TITLE: Regulation of Lead as a Fuel Additive

DATE: May 25, 1971

FACTS

We have reviewed the staff paper of April 15, 1971, entitled *The Regulation of Load as a Fuel Additive*, and have considered the points raised therein which are concerned with or require interpretations of Section 211 of the Clean Air Act.

QUESTIONS

1. May the Administrator, in promulgating a regulation on gasoline lead content under the authority of section 211(c)(1)(A) of the Clean Air Act, provide for the retention of such load as is necessary to meet the octane demands of higher compression vehicles now in use, or necessary to prevent valve seat damage to vehicles?

2. Does section 211(c)(2)(A) require the Administrator, as a prerequisite to promulgating a lead regulation, to find that a motor vehicle emission standard under section 212 of the Act would not be as technologically or economically feasible in preventing lead emissions?

3. Does the Administrator have the authority to prohibit gasoline retailers and other persons from pumping leaded gasoline into vehicles which are designed for operation as lead-free gasolines?

ANSWERS

1. We are unable to find legal support for regulation of gasoline lead content based on endangerment to public health which provides for the retention of lead for reasons not related to the protection of health. Likewise, regulation of lead based on endangerment to welfare may not provide for the rentention of lead for reasons not related to the protection of welfare. In the latter case, however, retention of lead to meet octane needs or to prevent valve damage may be justifiable to protect "economic values", or prevent against "damage to and deterioration of property" since those terms are included within section 303(h)'s definition of welfare.

2. Section 211(c)(2)A) requires the Administrator to consider any alternative technologically and economically feasible approaches to achieving by imposition of an emission standard under section 202, the degree of lead emission control which would be achieved by promulgating a lead additive regulation. A weighing of the technological and economic feasibility of any such approaches against fuel additive regulation is clearly called for by the section, but it does not expressly or impliedly establish emission standards as the preferential method of control, and no finding "that emission standards would not achieve the same effect" as a section 211 standard is required.

3. Section 211(c)(1) will support the promulgation of a regulation prohibiting service station personnel and other persons from pumping leaded gasoline into vehicles which are appropriately identified as being designed for operating on unleaded fuels only. Such action must be based on the Administrator's determination that emission products resulting from lead use impair the performance of motor vehicle emission control devices.

DISCUSSION

The staff paper states that regulatory action on leaded gasolines to protect the health or welfare should "elimiate all unnecessary emission of lead into the atmosphere". Unnecessary lead is discussed as that which is (1) not needed to produce octane ratings sufficent for operating high compression engine vehicles now on the road, or (2) not needed to protect engine valve seats of vehicles now in use.

This line of thinking suggests a proposed regulation in which the Administrator would state that he has determined that lead emissions from automobiles endanger public health, but that his standard(s) would be designed to accommodate "needed" lead. Implicit in such an approach is an admission by the Administrator that he is not able or unwilling to specify how much lead must be eliminated to protect health. If lead or any other additive or fuel component creates a health risk, it is clear that the Congress intended it be regulated to the extent necessary to remove the threat. It would not be unreasonable to arrive at that level for lead in several steps, since the time needed for development or refinery capacity to supply substitute higher octane fuel must be recognized, but logically the health protection level must be identified at the offset. Contrary to the paper's conclusion, we find no support for the indefinite retention of 0.5 gms per gallon lead or any other amount unless the Administrator determines that amount is consistent with the protection of public health.

The precursor to the requirement that the Administrator consider "other technologically or economically sound means of achieving emission standards under section 202" was language in the House bill requiring the Administrator to find that section 202 standards could not be reached by technologically or economically feasible means other than a fuel or fuel additive regulation. (This provision clearly would have established motor emission standards as the preferred regulatory approach). A formal finding of this nature would have to be recited in the proposal of the fuel or additive regulation, and would be subject to attack as not being reasonably supported by the available information. The Senate bill imposed no similar requirement. We think that the language adopted by the conferees is most reasonably interpreted as a compromise between the two bills whereby the Administrator is required only to weight the relative merits of available control approaches and choose the one best suited to accomplish the goal of protecting health or welfare. Formal findings are unnecessary. The conferees' "Discussion of Key Provisions" offered on the Senate floor on December 18, 1970 (Cong. Rec. S.20602) contained the following statement regarding the procedures and prerequisite set forth in their bill for fuel and additive regulation:

> ". . . The conference committee wishes to call the Administrator's attention to the relationship between his functions under this section and the emission deadlines stipulated in section 202. It is not not the intent of the Congress to create a cumbersome, time consuming administrative procedure which will delay necessary controls on fuels and fuel additives required to meet these deadlines."

While this statement does not bear directly upon lead regulation, it certainly indicates that no finding in any formal sense was intended.

While there is abundant language in the legislative history on section 211 (c)(1) concerning regulations which would impact upon fuel use by controlling the refiner or someone else in the manufacturer-wholesaler chain, we think it is clear from the following language in the conferee's "Discussion of Key Provisions" cited above that the conference committee did not intend to preclude the Administrator from imposing regulations controlling the delivery of the fuel at retail, where such means are best suited to accomplish the desired limitation:

> "The concept of a control or prohibition should be taken to include requiring design changes in motor vehicles, as well as fuel handling equipment, to ensure maximum compliance with regulation specifying acceptable fuel use for various classes of vehicles." (emphasis added)

We believe this language evidences the flexibility which Congress intended to provide the Administrator in this area.

Accordingly, in order to protect the operation of emission control systems whose performance would be impaired by the emission products of gasoline containing lead, the Administrator is authorized under section 211(c)(1)(B) to promulgate a regulation prohibiting any person from introducing leaded gasoline into the fuel system of a motor vehicle designed to operate on unleaded gasolines only. 1/ Implementing such a regulation would necessitate giving adequate notice concerning the vehicle's fuel requirement, presumably by requiring automobile manufacturers to label vehicles appropriately. 2/

1/ Section 211(d) makes any person who violates a regulation prescribed under (c) subject to a civil penalty of $10,000 for each day of violation.

2/ In connection with the development of APCO's proposed regulation requiring an instrument panel label stating lead and octane requirements, we advised orally that section 207(c)(3) would authorize a regulation requiring gas inlet labeling to provide this information which is relevant to control of motor vehicle emissions.

§ § § § § § §

TITLE: Regulations of Lead and Phosphorus Content of Gasolines

DATE: January 17, 1972

FACTS

Representatives of the Office of Air Programs and the Office of Enforcement and General Counsel have just completed a draft of regulations which, pursuant to section 211 of the Clean Air Act would, 1) provide for the general availability of one grade of lead-free and phosphorus-free motor vehicle gasoline at retail service stations, begining July 1, 1974, and 2) provide for the phased reduction of lead levels in all grades of motor vehicle gasolines, begining January 1, 1973.

Controls under (1) above, would be based on the Administrator's determination that virtually any lead or phosphorus in gasoline will significantly impair the performance of catalytic emission control devices which will be installed on 1975 and later model year authomobiles in order to meet EPA's stringent emission standards. Briefly the controls envisioned are as follows:

(a) Gasoline refiners would be prohibited, in the production of gasolines of 91 Research Octane Number or less, from using lead or phosphorus additives, and would be required to dye leaded gasolines and provide clear, uncolored lead-free gasolines;

(b) Gasoline distributors would be prohibited from selling gasoline represented to be lead-free and phosphorus-free unless it is in fact lead-free and phosphorus-free;

(c) Gasoline retailers would be prohibited from introducing gasolines containing lead into motor vehicles equipped for lead-free gasoline use only, and would be required to offer for sale at least one grade of lead-free and phosphorus free gasoline to label pumps so as to identify gasolines contaning lead and phosphorus, to post public notices on the service station premises regarding the use of gasolines containing lead and phosphorus in 1975 and later model year vehicles, and to equip gasoline pumps with nozzle spouts having specified dimensions and characteristics;

(d) Motor vehicle manufacturers would be required to manufacture vehicles having catalytic emission control devices with gasoline tank filler inlets of specified dimensions, and to affix a label on the instrument panel and adjacent to the gasoline tank filler inlet to inform the owner or operator and the service station attendant that the vehicle requires lead-free and phosphorus-free gasoline.

Controls under (2) above, would be based on the Administrator's determination that emission products resulting from the use of lead in gasoline endanger public health. Under this scheme, by January 1, 1977, lead levels would be reduced to 1.25 grams per gallon in premium and regular gasolines. The controls would apply to refiners, distributors, and retailers.

In addition, the regulations would provide for entry, inspection and testing by EPA representatives to determine compliance and would assign liability for violations of certain provisions of the regulations.

QUESTION

What is the scope of the Administrator's authority to regulate the manufacture, introduction into commerce, offering for sale or sale of motor vehicle fuels and additives?

ANSWER

Section 211 of the Clean Air Act provides the Administrator authority to take all regulatory measures reasonably necessary, as regards the manufacture, introduction into commerce, offering for sale or sale of motor vehicle fuels and additives, to ensure the protection of the public health and/or motor vehicle emission control systems.

DISCUSSION

1. This section of the memorandum first discusses generally the extent of the Administrator's regulatory authority under section 211, then deals with specific provisions of the proposed draft regulations.

2. The relevant language of section 211 appears in paragraph (c)(1), as follows:

> "The Administrator may. . . by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel additive for use in a motor vehicle or motor vehicle engine. . . ."

We conclude that this authorization empowers the Administrator to impose all regulations on the manufacture, introduction into commerce, offering for sale or sale of motor vehicle fuels and additives, which are reasonably necessary to prevent endangerment to the public health or welfare or to the operation of motor vehicle emission control devices. 1/ Since the quoted authorization is not limited nor the terms defined elsewhere in section 211 or in the legislative history of the section, it is reasonable to construe the words "control" and "prohibit" as having their ordinary meaning, i.e., their dictionary definition. 2/

1/ This assumes that the Administrator has satisfied the pertinent requirements of section 211(c) for establishing the need for regulation.

2/ The verb "control" is defined as meaning "to regulate" and "to exercise authority over; direct". "Prohibit" means "to refuse to permit; forbid, as by law". Webster's New World Dictionary, College Edition (1968).

3. Well-established principles of administration law support the conclusion that the Agency has broad discretion in deciding what regulations should be adopted to carry out the purposes of section 211. The general rule is that an administrative agency has the power to adopt regulations to carry out the policies of the laws which it administers if such regulations have a reasonable and rational basis. 3/ Reasonableness is determined in view of the stated objectives of the legislation and the nature of the difficulties to be overcome. 4/ This regulatory package is comprised of measures determined to be necessary to carry out the legislative purposes. In our opinion, the regulations are consistent with those purposes, would not have the effect of altering or amending the law, and are designed to deal with predictable problems inherent in the statutory scheme.

4. A major feature of the regulations is the provisions prohibiting refiners, distributors, and retailers from selling gasolines contaning lead in excess of that permitted under a prescribed lead content reduction schedule. There is no question that these provisions are within the plain language of above-quoted grant of authority to "control or prohibit" the sale or offering for sale of fuels and additives for use in motor vehicles. Moreover, the Senate Committee report contains this statement:

> "[T]he committee expects that the [Administrator] may find it advisable to permit the continued sale of leaded gasolines to allow for the efficient and economic operation of automobiles presently on the highway...." S.R. 91-196, 91st Cong., 2d Sess. 34 (1970).

Implicit in this statement of intention that the control or prohibition need not be an absolute ban is the acknowledgement that the Administrator would be empowered to impose a complete prohibition on leaded gasoline sales, if he deemed it necessary.

5. Another regulation controls the manufacture and sale of gasolines of a specified octane, by prohibiting the use of lead and phosphorus additives in their production, and specifying maximum lead and phosphorus content. This measure regulates only those refiners who produce a low octane gasoline for sale - it does not require any refiner to produce such gasolines for sale. In our view, this regulation is clearly within the "control or prohibit" language.

6. The draft regulations would require retailers having average and above gasoline sales to offer for sale at least one grade of lead-free and phosphorus-free gasoline, in order to provide for the general availability of a gasoline suitable for catalyst-equipped vehicles. That this kind of "control" over the offering for sale of gasolines was considered and approved by the Senate is clear from this language in the report of the Senate Committee, which added the term "control" to the House bill's "prohibit":

3/ American Trucking Assoc., Inc. v. United States, 344 U.S. 298 (1953); Greyhound Corp. v. United States, 221 F. Supp. 440 (N.D. Ill. 1963).

4/ Am. Jur. 2d Administrative Law 304.

> "This authority to 'control' the use of fuels is intended to give the [Administrator] greater flexibility than the authority to 'prohibit'. For example, the [Administrator] may find. . . it necessary to control fuels to assure the availability of non-leaded gasolines. . ." [emphasis added]. S.R. No. 91-196, 91st Cong., 2d Sess. 34 (1970).

The conferees retained the Senate's "control or prohibit" wording, but extended the authority to additives. There is nothing in the Conference Report to indicate that the conferees did not adopt the Senate's policy as well as its language in this regard.

7. The expansive regulatory reach which the words "control or prohibit" were intended to authorize is further explained in the Senate conferees' Discussion of Key Provisions, presented on the Senate floor, as follows:

> "The concept of a control or prohibition should be taken to include requiring design changes in motor vehicles, as well as fuel handling equipment, to ensure maximum compliance with regulations specifying acceptable fuel use for various classes of vehicles." 116 Cong. Reg. 20601-02 (daily ed. 1970).

This statement emphasis congressional awareness that regulations would have to be imposed which would bar the use of gasolines containing certain substances in vehicles equipped with catalytic control devices, and which would prescribe specifications for automobile gasoline tank filler inlets and for gasoline pump nozzles necessary to implement those prohibitions.

8. The various labels and the notification which the regulations would require on motor vehicles and gasoline pumps are designed to impose EPA "control" over the retail sale of gasolines by continually alerting and educating the buyer and the seller to the requirements of the law and the importance of the catalytic system to air pollution control. We conclude that they are controls which the Administrator might reasonably conclude are a necessary component of the comprehensive regulatory effort to protect catalytic emission control systems.

9. Likewise, the requirements that refiners dye gasolines containing lead or phosphorus and provide clear lead-free, phosphorus-free gasoline are in our opinion, controls which are reasonably necessary to assist fuel handlers in preventing contamination problems from developing. This procedure will provide for ready distinction between gasolines in the distribution chain, in an effort to minimize human errors in handling.

§ § § § § § §

TITLE: **Reproposal of Proposed Lead Regulations**

DATE: December 15, 1972

MEMORANDUM OF LAW

FACTS

On February 23, 1972, the Agency proposed regulations which would, in part, have required the phased reduction of lead content in leaded motor vehicle gasoline, beginning January 1, 1974. 1/ Published with the proposal was the Administrator's conclusion that a specified reduction in airborne lead levels was necessary to protect against endangerment of public health, and that the schedule proposed, along with the requirement of one grade of lead-free gasoline also proposed, would provide the needed protection. The Administrator's analysis and determinations regarding information on airborne lead and health were made available to the public contemporaneously with the proposal in a paper entitled "Health Hazards of Lead".

Three public hearings were held on all questions concerning the regulation of lead in gasolines, although the Agency was not required by the Act to hold hearings on the proposed regulations to protect public health. At the hearings, the Agency's published rationale for the health-based proposal was severely criticized by the oil and lead industries, particularly with respect to the conclusion on an acceptable concentration of airborne lead. Following the hearings, EPA published a formal request for additional information and views on the question of airborne lead as a health hazard. 2/. Substantial new data and opinions were received.

Recently, it has been suggested that the initially proposed lead reduction schedule for leaded gasolines be deferred for one year and completely reproposed in the Federal Register. The reproposal would incorporate EPA s new rationale for health-based regulation of leaded gasoline, which is substantially different from the original rationale, incorporates new studies, information and opinion, and abandons some studies and other material previously relied upon.

Discussion has arisen as to whether EPA is legally required to repropose the regulations prior to final rule making, on the grounds that a new health argument would be relied upon for the basis of the regulations and/or that the deferred dates of implementation would not have previously been proposed.

QUESTION

Under the facts presented above, is EPA required by law to repropose the regulations which would provide for the phased reduction of the lead content in leaded motor vehicle gasolines?

1/ 37 F.R. 3882.

2/ 37 F.R. 11797, June 14, 1972. this document expressly expanded the issues in the rule making to include human lead intake via ingestion of dust contaminated with lead from auto exhaust.

ANSWER

No. Neither the Clean Air Act nor the Administrative Procedure Act requires a reproposal prior to final promulgation.

DISCUSSION

1. The primary issue presented here is the sufficiency of the notice given by the February 23, 1972 proposal to legally support promulgation of the regulations. The Administrative Procedure Act (APA) 3/ provides that notice of proposed rule making must be published in the *Federal Register*, and that the notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved". EPA chose to include the specific terms of the rules in its proposal. The Agency's publication at the time of proposal of the details of its basis for regulating was action in excess of the notice requirements of the APA.

2. The Court of Appeals for the District of Columbia Circuit, the circuit in which Agency action under §211 would be reviewed, disposed of the key question in this case almost twenty years ago. In *Logansport Broadcasting v. F.C.C.*, 210 F. 2d 24 (D.C. Cir., 1954), the F.C.C. had proposed regulations and at the same time announced several priorities under which its proposed action would be taken. When F.C.C. finalized its rules, it announced that a particular rule had been based upon a significant new priority not included in the proposal. The petitioner claimed that this action violated the notice requirements of the APA. The Court ruled that the APA had been compiled with, since the Agency had given notice of the subjects and issues involved in the rule making. In recognition of the problems encountered in complex rule making the Court stated:

> "Surely every time the Commission decided to take account of some additional factor it was required to start the proceeding all over again. If such were the rule the proceedings might never be terminated".

The *Logansport* decision has since been cited in *Buckeye Cablevision Inc. v. F.C.C.*, 387 F. 2d 220, 224 (D.C. Cir., 1967) and *California Citizens Band Assoc. v. U.S.*, 375 F. 2d 43, 48 (9th Cir. 1967) in support of the proposition that notice under the APA requires only a description of the subjects and issues involved.

3. The Agency's February 23 notice of proposal clearly raised the subject and major issues of regulation of lead additives based on health risks associated with airborne lead produced by the use of such additives. Under the *Logansport* case, the fact that the rationale for such regulation make that notice insufficient. Moreover, with the publication of the June 14, 1972 invitation to comment on the question of lead in dust, a topic which has now become a key part of EPA's health rationale, the Agency gave notice that this subject was being given specific consideration in the rule making process.

3/ 5 U.S.C. 553(b)

4. The issue of the timing of implementation of a lead reduction schedule was also raised by the Febraury 23 notice, since a specific time schedule was set forth. The affected industries and environmental groups commented on this schedule at the public hearings and in other submitted comments. We believe that the *Logansport* case and the other cases cited above clearly support the position that an agency may set back the effective date of regulations from the date proposed. The fact that the rule making process consumed a significant portion of the lead time necessary to achieve compliance by the dates proposed would appear to add legitimacy to the deferral of these regulations' implementation, although we have uncovered no authority for that proposition.

5. One additional case is deserving of discussion, inasmuch as it holds that an agency's notice of proposed rule making was insufficient to comply with the APA. In *Wagner Electric Corp.* v. *Volpe*, 466 F. 2nd 1013 (1972), the Third Circuit did not challenge the established law that the APA requires only a description of the subjects and issues involved in rule making, but held that the proposals of the National Highway Traffic Safety Administrator were not adequate to fairly raise a particular topic which was the subject of a final rule. In our view, the Court made no departure from the settled law, but demonstrated that it would analyze in detail the relationship of a specific rule to the subjects and issues raised in the notice, and determine whether a sufficiently "intimate relationship" existed between the proposal and that rule. In making its analysis, the Court relied upon the nature of the comments received on the proposals and the representativeness of the comments from all groups which would reasonably be considered "interested persons" within the meaning of the APA. It is important to note that in *Wagner* the terms of the final rule involved were never proposed nor was the specific issue (performance characteristics of flashers) ever addressed in a notice.

6. We believe that final promulgation of the lead-reduction regulations on a deferred implementation timetable without regulations on a deferred implementation timetable without reproposal will withstand a *Wagner*-like examination. Examination of the extensive comments and hearing testimony will demonstrate that the issues if what the basis for regulation should be, what reductions are necessary, how they are to be achieved and enforced, and on what timetable they are to be implemented have been fairly raised by the published notices.

7. A final issue is whether the Clean Air Act could be construed to require reproposal where the rationale for regulations is greatly revised during the rule making process. Section 211(c)(1)(A) of the Clean Air Act authorizes the Administrator to control or prohibit a motor vehicle fuel additive if it will endanger the public health upon this (among other) prerequisites (also in §211).

> (c)(2)(C) No. . .fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and published such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the. . .fuel additive proposed to be prohibited.

8. No prohibition on the basis of health endangerment has been proposed in the lead-reduction schedule, only controls. However, the Agency applied §211(c)(2)(C) broadly to the entire February 23 proposal and published with the proposal the Administrator's findings on the substitution issue with respect to the lead-reduction program overall. [4] Since the lead-reduction schedule now under consideration involves the same numbers as the proposed schedule but merely defers its initiation, it does not appear that any revision to the published findings regarding fuel or additive substitution would be necessitated. If the Agency should determine that the postponement would necessitate any such revision, we believe that publication of the revision at the time of promulgation is all that is required by the section, not a reproposal of the regulations and a publication of the revised findings.

§ § § § § § §

TITLE: Preemption of Municipal Lead Additive Controls Under the Clean Air Act

DATE: December 27, 1972

MEMORANDUM OF LAW

FACTS

The City of New York has in effect regulations which control the lead content of all grades of motor vehicle gasolines as follows:

January 1, 1972 - 1.0 grams per gallon
January 1, 1973 - 0.5 grams per gallon
January 1, 197[illegible] - 0.0 (trace lead) grams per gallon

The Agency will soon promulgate regulations which will require that one grade of lead-free gasoline of at least 91 octane (R.O.N.) be sold at all major retail outlets on and after July 1, 1974, and will repropose regulations the substance of which proposed February 23, 1972, providing for the reduction of lead content in leaded grades of gasoline. EPA's promulgated regulation will allow lead contamination not to exceed 0.05 grams per gallon.

The City of New York's lead reduction schedule is based on considerations of public health protection. The basis for EPA's lead-free gasoline regulations is to provide for the protection of catalytic emission control devices which will be installed on 1975 and subsequent model year motor vehicles. However, because such a regulation would have the effect of reducing lead usage in gasoline on an accelerated basis for every model year beginning with the 1975 model year, it will ultimately have an effect on the protection of public health. The pace at which this effect will be realized is problematical, since any refiner may increase lead levels in leaded gasolines if they are unregulated.

---

[4] Publication of the finding(s) at the time of the proposal appears to be required by §211(c)(2)(C).

The City of New York is concerned as to the scope and timing of any preemptive effect of the promulgation of EPA regulations for unleaded gasoline. Understandably, motor vehicle gasoline refiners and retailers as well as environmental groups are also concerned regarding preemption of the New York regulation and other State and local regulations. While the Agency is not required by the Act to issue any opinion regarding the preemptive effect of its regulation, it is clear that this question will be addressed to the Administrator by the press, the Congress and others when EPA's regulation is promulgated.

QUESTION #1

To what extent, if any, will the promulgation by EPA of a regulation prescribing that major retail outlets market, after July 1, 1974, at least one grade of inleaded gasoline in all grades of gasoline?

ANSWER #1

While the issue is not clear, it appears that EPA's promulgation would not preempt the New York City regulation to the extent the latter is based on protection of health, since the Administrator's contemporaneous reproposal of lead-reduction regulations constitutes Agency acknowledgement that further regulation of lead additives for health reasons may be necessary.

QUESTION #2

Assuming that EPA's promulgation does effect preemption with respect to the one grade of gasoline covered, does preemption occur on the date of EPA's promulgation, the effective implementation date prescribed by that regulation, or some other date?

ANSWER #2

As in Question #1 above, the answer is not entirely clear, but it appears that the preemption would apply from the date of promulgation of EPA's regulation.

DISCUSSION

1. The preemption language of §211 of the Act appears in subparagraph (c)(4)(A) as follows:

> "[No] State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, and control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine (i) if the Administrator has found that no control or prohibition under [this section] is necessary and has published his finding in the Federal Register, or (ii) if the Ad-

ministrator has prescribed under [this section] a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator."

2. In order to determine the preeemptive effect of EPA's intended promulgation/reproposal, it is necessary to "explore the meaning of this provision and its legislative history. . .". 1/ The statutory language sets forth the basic scheme relatively clearly: it allows the States and their political subdivisions to regulate a fuel or additive unless and until the Administrator takes one of the actions described. With respect to the legislative history, neither the House nor the Senate bill contained any preemption provision; it was added by the conferees. The conference report 2/ contains the following explanation of §211(c)(4) at page 53:

> No State may prescribe or enforce controls or prohibition respecting any fuel or additive unless they are identical to those prescribed by the Federal Government [or are approved as an implementation plan measure].

Thus, the only legislative history on the section merely frustrates understanding of its provisions by contradicting the wording of the section.

3. By promulgating the intended regulation, EPA will impose a prohibition (subject to the trace contamination level) against the marketing of lead additives in motor vehicle gasolines of 91 R.O.N. or less and at the same time impose a control with respect to gasolines of that octane grade. Standing alone, this action would appear to fulfill the requirements of §211(c)(4)(A)(ii) with respect to lead additives, i.e. any State (except California) or local lead regulation not identical to the Federal regulation would fall. However, EPA's intended reproposal of a lead reduction schedule clouds the issue, since the Agency will in effect be saying that for lead it has not yet issued all the regulations which it may issue "applicable to such. . .fuel additive". It is important, we think, that this statement is nearly the opposite of the "no regulation necessary" statement provided for in §211(c)(4)(A)(i). Therefore, it is not difficult to imagine that a court might view the Agency's action as incomplete with respect to lead from the standpoint of either of the actions provided for in §211(c) (4)(A).

1/ This was the duty which the Court imposed upon itself in *Chemical Specialities Mfrs. Ass'n.* v. *Lowery*, 452 F. 2d 431, 437 (1971) in examining the preemptive provision on precautionary labeling in the Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq*).

2/ H.R. REP. NO. 1783, 91st Cong., 2d Sess., Dec. 17, 1970.

4. Another material consideration is that courts generally read preemption clauses narrowly, especially where State or local health and safety measures are concerned.[3] Where, as here, the matter on which Federal action is being held in abeyance (lead as a health hazard) is the subject of the local regulation, a court may be reluctant to find that the latter has been preempted. The Second Circuit (in which any action brought to overturn the N.Y.C. regulation would be brought) has recently indicated that in preemption cases it may place as much importance upon the need for the local regulation and its potential impact upon interstate commerce as it places upon the express preemption language of the statute.[4] This kind of approach would seem to leave the door open for the court's consideration of the capacity of the two regulations involved here to coexist without conflict, an issue traditionally limited to preemption questions where no express preemption provision is in the statute.

5. We think it is helpful to compare the preemption provision at issue with the preemption language of §233 of the Act which bans State or local regulation of aircraft emissions unless they are identical to any Federal regulations. While Congress obviously sought to avoid the proliferation of varying and inconsistent regulations for aircraft, §211(c)(4)(A) indicates that it was not so concerned about this problem for fuels and additives since no preemption independent of Agency action is provided for in §211. This fact may provide a court additional basis for determining that where the State or locality is acting to prevent public health hazards any incomplete action by EPA should not be held to disrupt the ongoing program.

6. If a court should hold that EPA's promulgation does effect preemption with respect to regulation of lead use in gasolines of 91 R.O.N. or less, it appears that preemption would be held to take effect from the date of EPA's promulgation. "Promulgate" and "prescribe" are used interchangeable throughout the Act, and there does not appear to be any basis for interpreting "prescribe" in §211(c)(4)(A)(ii) as meaning anything other than "promulgate". It is possible that a court would look to the practical consequences of this result and be compelled to some other conclusion. In the New York City case, the readily foreseeable consequence is that from the date of EPA's promulgation until July 1, 1974, retailers would be allowed to sell 91 R.O.N. gasoline of any lead content.

---

[3] The Supreme Court's statement in *Florida Lime & Avocado Growers, Inc.*, V. *Paul*, 373 U.S. 132, 142 (1963) is instructive:

> The principle to be derived from our decisions is that Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, *or that the Congress has unmistakably so ordained.*

[4] *Chemical Specialities Mfrs. Ass'n.* v. *Lowery*, *supra* note 1.

7. These issues are also raised by EPA's intended action: whether the Agency should issue any statement interpreting the preemptive scope of its promulgation, what form any such statement should take, and what legal consequences flow from any such statement. Clearly, the issuance of an interpretative statement is not required by the Act. If a statement is to be issued it could range in formality from a press release or letter to a pronouncement in the preamble of the regulations or an interpretative regulation in the promulgation itself.

8. Any interpretative statement would basically be interpretative of the statute itself, i.e. the Agency would be giving its opinion of how §211(c)(4)(A) applies to the Agency action taken. The legal significance of such a statement appears to be limited to its persuasiveness to the court. The Second Circuit has stated what we believe to be the prevailing judicial view as follows:

> "Here. . .we deal with a federal statute. . . . Thus, while the views of the responsible administrative authorities are welcomed, they are to be accorded no greater weight than the logic which supports them."5/

While courts often give substantial weight to a formal interpretation of a law by its administrative agency, it is our view that an interpretative regulation or other formal pronouncement (such as in the preamble to the regulations) in the situation would likely be accorded no more dispositive effect than that indicated in the above quotation. This is because judicial reliance upon administrative interpretation is largely limited to technical areas where the courts have limited ability to second-guess the judgment of the administering agency. In contrast, the preemption, issue is not technical in nature but rather involves determining how the Congress intended to avoid overlapping and/or inconsistent regulation of affected parties by the Federal and other governments.

9. Finally, when a refiner subject to the New York City regulation sues in the U.S. District Court to overturn the regulation on the ground that it has been preempted, the Agency may be called by either or both sides to submit an amicus curiae brief to the Court setting forth our interpretation. In Chrysler Corporation v. Tofany 6/, the Second Circuit appeared to attach great significance to the Federal Highway Administration's interpretation of its statute's preemption language as set forth in an amicus brief. However, the Court in that case clearly would have arrived at its conclusion even without the Agency's interpretation which "further strengthened" its own, and the court appears to overstate the law on the significance of administrative interpretations.

5/ Id. It is not clear from the Court's opinion what form the administering agency's (DHEW) statement took.

6/ 419 F. 2d. 499, 512 (1969).

EMERGENCY ACTION

TITLE: Emergency Authority (Section 303)

DATE: November 29, 1971

Under section 303, the Administrator may restrain any person causing or contributing to pollution which prevents an iminent and substantial endangerment to the public health of persons if appropriate State or local authorities have not acted to abate such sources. The only time that court action has been sought under this section was the recent episode in Birmingham, Alabama. Although the Birmingham situation was probably unique it will be described here to illustrate the way the section may work, rather than the way it probably will work under other circumstances.

The Office of Air Programs in Durham was aware of the weather conditions and the mounting pollution levels in Birmingham on Tuesday, November 16. Late Tuesday night and early Wednesday morning the decision was made to send personnel from EPA and the Department of Justice lawyer to Birmingham. On arrival there, in midafternoon on Wednesday, it was determined that the levels were exceedingly high, i.e. , they had reached levels equivalent to those that our regulations say should never be reached, that the county program had attempted to secure reduction of emissions by voluntary compliance, that these efforts had been unsuccessful, and that neither the State nor the county had any legal authority to take further action. At a press conference, which had been scheduled by the county prior to our arrival, these facts were announced to the public. At the same time, of course, it was announced that EPA representatives were there and had authority under the Federal Clean Air Act to do something. Under these conditions, there was no alternative for EPA but to proceed. (Although no formal public request was made State and county officials privately insisted that EPA proceed).

That evening, we secured a temporary restraining order, without notice, requiring 23 major industries to take specific actions to curtail or terminate emissions. These actions were carefully limited to those which could be accomplished without harm to the equipment involved. On Friday morning, November 19 EPA asked the Court to dissolve the order and dismiss the case.

One other incident is worth noting with regard to emergency powers. In February of this year, the City of Chattanooga was experiencing an inversion and elevated levels of particulate matter. At that time, we were in constant telephone contact with Chattanooga. There the county health department did not have legal authority to ask the mayor to issue emergency orders. The county invoked these powers and the mayor did issue such an order essentially closing down 18 major sources. Chattanooga was significant because the Director of the Air Pollution Program made it quite clear that he would not have requested that such action be taken unless he had Federal support, i.e., prior to issuing the orders he asked for and received a commitment from EPA that in the hearing which followed the order, EPA experts would be available to testify as to meteorology, emission levels, etc.

At that time, an EPA team, including a representative from the Office of General Counsel, and the Department of Justice, were in Chattanooga.

These are the only two instances in which situations were presented where it appeared that EPA court action was likely.

The Birmingham incident is probably unique in that the levels were extremely high, there was absolutely no legal mechanism by which reductions in emissions could be achieved, and the State and county people virtually publicly announced they expected EPA to take action. The Chattanooga incident is probably more typical of the way emergencies will be handled.

The problem in invoking section 303 are substantial. First of all, there is the need for reliable information, i.e. air quality data, the types of sources which are contributing to the problem, and what can be done to curtail these emissions. Moreover, there is the assessment of whether or not there has been adequate State or local action. Adding the time needed for the decision-making process within EPA, the possible delay for assessment by the Department of Justice and the mechanical task of drafting the appropriate documents, the instances where effective action could be taken are limited. Moreover, we would generally have to ask for a restraining order without notice to the people affected by the order. While the Judge in Birmingham was willing to do this, we cannot assume that it will be true in other cases. In short, it will only be the unusual situation where it will be necessary or appropriate for EPA to fully invoke section 303.

In addition to these technical and logistical problems the "political" problem is the most difficult. States do nor want to be put in the position of asking for Federal assistance, not do they want to suffer the criticism which must follow Federal Action, viz the State's failure to protect public health. Against this must be balanced EPA's responsibility under the Clean Air Act.

In trying to make this determination as a purely theoretical matter, EPA takes the position that if levels have not gone down the action has been inadequate, no matter what has been done. As a practical matter, however, this is translated into an approach where, if EPA's technical people make a judgment that reasonable measures have been taken, we would not act though the levels did not go down. That is, unless we have substantial measures that we could request a court to order, we would, of course, not proceed to court.

This question has been raised in several incidents around the country where EPA has not felt the facts warranted action. In various episodes, Governors and officers have issued warnings that such an episode was taking place, have requested that people stay home or inside to the extent possible, discontinue those activities which can be easily discontinued, and take other voluntary measures which may have some effect on the level of pollutants. In the Senate Report on the 1970 Amendments of Committee indicated that they were dissatisfied with these types of actions. Implicit in this criticism was criticism of EPA (then HEW) for failure to act when this was all the action taken by States.

The completion of State implementation plans in January of 1972, should to a great extent, solve these problems. In those plans, States are required to have complete emergency procedures. Thus, hopefully States will adopt levels of pollution at which major sources are required to take certain abatement actions. In most cases the actions to be taken by such sources will be negotiated with the State or local air pollution agency. Thus each State will be able to take into consideration not only the technical problems but the total effect of their emergency plan on their community. This will include the economic and social effect. Once these strategies are adopted, this part of the implementation plan will be enforced by the State. The main effect of this will be to a large extent to eliminate much of the discretion now in EPA. With the plans in effect, it will only be necessary to look at what a State said is necessary to be done at certain levels under certain conditions, and see whether or not it has in fact been done. If it has not it will be enforced by EPA in the same manner that any other portion of the implementation plan will be enforced upon a State's failure to do so.

§ § § § § § §

TITLE: Definition of "Imminent Endangerment" (Section 112)

DATE: April 26, 1972

You asked for a legal opinion concerning the legal constraints in defining "Imminent endangerment" as used in Section 112 (c)(1)(B)(ii) of the Clean Air Act.

There are few legal constraints on the definition of this term; therefore, the definition should be developed primarily by OAP and ORM. We would want to review the basis for the definition you develop.

One legal constraint that does exist is that the imminent endangerment should be related to the endangerment of the most sensitive population, other than those in a controlled environment. For example, pregnant mothers and children should be considered, rather than the average person, if they are particularly sensitive to the effects of any of the hazardous pollutants. This is consistent with the advice provided by the General Counsel to the Office of Air Programs in connection with the definition of a similar term under Section 303 of the Clean Air Act.

The only other legal constraint is that the definition must not be "arbitrary or capricious", i.e., must have a reasonable basis.

In defining the meaning of this term, I would suggest that the following factors be specifically addressed:

1. Whose health are concerned with? This involved the question of unusually sensitive groups.

2. When should health effects be evident? I am thinking particularly of carcinogens, which may have a long latency period. The question should be explicitly addressed whether "imminent" is considered to apply to the time of contracting the illness or the time that the health effects become evident.

3. What level of risk is so great as to constitute "endangerment"? This is a problem for pollutants which involve a continuous relationship between dose and statistical probability of contracting an illness (as opposed to severity of illness). Is there a level at which the statistical probability of contracting the illness is so low as not to constitute "endangerment", even though the illness, if contracted, will be very severe or fatal, e.g., cancer?

4. How will you deal with pollutants that cause illness only after considerable cumulation in the body? This may be one of the smaller problems if such pollutants do not, under existing non-controlled conditions, cause serious risk to persons unless they are exposed over many years. Exposures of two or more years at existing levels would probably not constitute "imminent endangerment".

5. What type of health effect are you concerned with? As a starting point, such effects should constitute "an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness".

6. How does definition compare with similar definitions, if any, for other pollutants? Conclusions reached in connection with Section 112 should be compared with conclusions reached in connection with other pollutants under other sections of the Clean Air Act and other pollutants studied or controlled by EPA. Some of the questions that must be considered in connection with these pollutants involve value judgments that should be compared with other value judgments reached elsewhere in EPA.

One possible definition might be based on the distinction between those exposure levels which have been shown to have caused illness, as opposed to those levels which theoretically might cause illness. This approach is not free from difficulties but it might offer some practical solutions to this difficult problem.

AIR: GENERAL

TITLE: Information Gathering Under the Clean Air Act, as Amended--Necessity of OMB Clearance

DATE: February 25, 1971

1. Several sections of the Clean Air Amendments of 1970 provide the Administrator significant authority to require information necessary to carry out his responsibilities under the Act:

a. Section 114 - in order to develop or assist States in developing implementation plans (§110), to develop new source performance standards (§111), or hazardous pollutant emission standards (§112), to investigate violations of standards and plans, or to carry out the emergency episode abatement authority (§303), the Administrator may, inter alia, require the owner or operator of a stationary source of air pollution to establish records, make reports, and provide information generally;

b. Section 115(j) - in connection with an air pollution abatement conference the Administrator may require a polluter to report to him information on the "character, kind, and quantity of pollutants discharged" and the control devices used by the polluter;

c. Section 202(c(4) - for the purpose of supplying the National Academy of Sciences any information it deems necessary to conduct a study and investigation of the technological feasibility of meeting the 1975 and 1976 automobile emission standards, the Administrator may use any information gathering authority he has under any provisions of the Act;

d. Section 211 - for the purposes of registration and regulation of fuels and fuel additives, the Administrator may require the manufacturer of a fuel or fuel additive to provide him information on emission products and health or welfare effects resulting from the use of such a fuel or additive.

e. Section 307(a) - in connection with his determination on postponing the applicability of an implementation plan requirement (§110(f)), his determination on the suspension of a 1975 or 1976 automobile emission standard for one year(§202(B)(5)), the gathering of information for annual reports to the Congress regarding motor vehicle pollution and its control, or to obtain information from motor vehicle manufacturers concerning effects of fuel additive use on emission control systems (§211)(c)), the Administrator is authorized to subpena witnesses, papers, books, and documents.

2. In connection with obtaining necessary information, APCO is in the process of developing plans and preparing forms which in most cases would be submitted, after appropriate EPA review, to the Office of Management and Budget for review and clearance. OMB clearance would be sought pur-

suant to the requirements of the Federal Reports Act of 1942 (44 U.S.C. 3509) 1/ 2/ and OMB Circular A-40 (copy attached) implementing the Act. It is our view that before any such action is taken, consideration should be given to the attached Department of Justice memorandum of law in the case *Puritan Fashions Corp. et al. v. Federal Trade Commission, et al.* 3/ The memorandum traces the legislative history of the Reports Act, and treats exhaustively the Act's definition of the term "information" as used therein. First, Justice maintains that the Reports Act is limited by its literal terms, as clearly supported by the legislative history, to agency collection of factual data intended "to be used for statistical compilations of general public interest." Second, it is argued that Congress did not intend the Reports Act "to govern the independent law enforcement compulsory investigative process" agencies. Justice's strict interpretations of the scope of the Federal Reports Act is correct, in our opinion, and it unquestionably constitutes the prevailing construction of the statute for the Executive Branch. 4/

3. Applying the first point in the memorandum to the information listed above, we conclude that none of it is subject to the Reports Act to the extent that it is not collected for the purpose of preparing statistical compilations of general public interest; each requirement is tied to the discharge of a specific responsibility under the Clean Air Act. Justice's second point was restricted by the facts of the case to excepting from the Reports Act the compulsory investigative process of the adjudicatory regulatory agencies, but we think it is necessary and reasonable to apply it to information specifically obtainable by subpena by EPA under the Act.

1/ Section 5 of the Act provides:

> "A Federal agency may not conduct or sponsor the collection of information upon identical items, from ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in such collection--(1) the agency has submitted to the Director [of the Office of Management and Budget] the plans or forms, together with copies of pertinent regulations and of other related materials as the Director. . . has specified; and (2) the Director has stated that he does not disapprove the proposed collection of information".

2/ See memorandum: Air pollution control--Clean Air Act--Collection of information--Applicability of the Federal Reports Act of 1942 (August 15, 1966).

3/ Civil No. 70-64, U.S.D.C., D.C. This suit is still pending. The Government currently is resisting a number of interrogatories propounded by Puritan.

4/ Mr. Gil Zimmerman, Assistant United States Attorney, District of Columbia, advises us that Justice has not altered its position, and that OMB opposes its interpretation. The F.T.C. and OMB have an arrangement pending the outcome of the case whereby F.T.C. submits forms to OMB for review, but OMB has no authority to revise them.

and to information related to enforcement. Moreover, we think the rationale they express in the second paragraph on page 6 of the memorandum applies with equal force to information gathering under any specific authority or responsibility assigned by Congress so long as it does not involve statistical reports or the like. We see no reason why the applicability of the Federal Reports Act should be extended beyond its terms so as to impede or defeat the implementation of other laws. 5/

4. There is a history of problems associated with OMB clearances of information gathering in the air and water pollution control fields. We understand that the OMB industry advisory group, which reviewed forms and plans submitted by the Federal Water Quality Office (then FWQA), delayed clearance for years. A form submitted by DHEW-NAPCA was cleared in ten months, and that was accomplished only as a result of continual pressure from NAPCA. Delays experienced in obtaining information upon which to base development of stationary source emission standards, for example, would be disastrous.

5. We feel that the issues touched upon in this memorandum should be discussed within EPA as soon as possible, with a view toward developing an Agency for discussion with OMB.

§ § § § § § §

TITLE: Payment of Costs Awared to Successful Litigants under Clean Air Act

DATE: July 12, 1973

Facts

The Clean Air Act provides, at 42 USC 1857h-2(a), that citizens may sue the Administrator for failure to perform a non-discretionary act. 42 USC 1857h-2(d) provides in pertinent part:

> The court, in issuing any final order in any action pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

In at least one instance, the Administrator has been successfully sued by a citizen organization under the Act.

5/ OMB Circular A-40 which implements the Reports Act, goes beyond the scope of the Act. Its definition of "information" is not consistent with the Reports Act's definition of that term, as interpreted by the Justice Department.

QUESTION

Does EPA bear the ultimate burden of payment of costs awarded by a court in a Clean Air Act citizen suit?

ANSWER

No. A special Government-wide appropriation exists for payment of judgments, costs, and interest in final decisions adverse to the United States; that appropripriation is administered by the General Accounting Office. No action by EPA is necessary.

DISCUSSION

28 USC 2412 states in full:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government, shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

The first sentence of 28 USC 2412 is paralleled by the "award of costs" provision of the Clean Air Act quoted above (except that the prohibition against award of attorney fees and expenses is removed by the Clean Air Act provision). The third (last) sentence of 28 USC 2412 is applicable to all judgments for costs, and states that judgments for costs are to be paid as money judgments against the United States are paid.

28 USC 2414 provides in pertinent part:

> Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office.

The Justice Department routinely referes to the General Accounting Office final judgments or costs awards which require payment of sums by the United States. GAO, in turn, "certifies: the propriety of payment of such judgments and/or costs. Pursuant to 31 USC 724a, a special open-ended appropriation is available for immediate payment by the Treasury Department of GAO-certified

> final judgments. . . (not in excess of $100,000 . . . in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law. . .

Where a judgment exceeds $100,000, Congress acts specifically to approve its payment. (Over-$100,000 cost awards arguably would not require referral to Congress).

Mr. John Moore, an Assistant General Counsel at GAO, informed me that judgments and costs are never charged against agency appropriations (except in the case of certain Government corporations). The appropriation created by 31 USC 724a, and specific appropriations tied to individual over-$100,000 judgments, are the only ones charged.

Mr. William Arnold at General Litigation Section, civil Division, DOJ, Says that the Justice attorney handling the case will handle the GAO referral.

NOISE CONTROL ACT OF 1972

TITLE: EPA Enforcement Responsibilities

DATE: June 28, 1973

QUESTION

What enforcement responsibilities does EPA have under the Noise Control Act of 1972?

ANSWER

EPA is responsible for advising the Department of Justice to seek criminal convictions or injunctions against violations of §6 ("Noise Emission Standards for Products Distributed in Commerce") and §8 ("Labeling") of the Noise Act. The Department of Transportation has primary responsibility for so advising the Justice Department with respect to violations of §17 ("Railroad Noise Emission Standards") and §18 ("Motor Carrier Noise Emission Standards").

EPA also is responsible for issuing orders specifying necessary relief for violations of §6 and §8 of the Act and may issue such orders for violation of §17 and §18 of the Act.

DISCUSSION

The following sections of the Noise Act provide for regulatory standards:

§6	Noise Emission Standards for Products Distributed in Commerce
§7	Aircraft Noise Standards
§8	Labeling
§9	Imports[1]
§17	Railroad Noise Emission Standards
§18	Motor Carrier Noise Emission Standards

EPA clearly has no enforcement authority under §7.

---

[1] This section will not be discussed in this memorandum because it is addressed to "new products" for which regulations will not be published until October 1974. The enforcement issues in connection with this issue can be worked out later and be partially based on the resolution of enforcement issues under §§17 and 18.

EPA equally clearly has enforcement responsibilities under §§6 and 8. Violations of these sections are punishable by criminal penalties, §11(a) and and may be restrained by injunction §11(c). The Department of Justice is responsible for bringing such actions but EPA must notify Justice of possible violations and assist in developing the case just as we have been doing in actions under the Clean Air Act and Refuse Act and will do under the Federal Water Pollution Control Act.

States can, but are not required to, adopt standards under §§6 and 8, which are identical or not in conflict with EPA's standards §6(e) and §8(c). To the extent that States adopt and enforce such standards, EPA's enforcement responsibilities will be lightened. However, EPA is ultimately responsible for enforcing these sections and has no basis for not meeting this responsibility if the States fail to adopt and enforce standards covering the same actions.

A question has been raised whether EPA could rely on State action or citizen's suits as the primary means of enforcement. This was the enforcement approach taken in the Administration's Safe Drinking Water bill.

Although the Noise Act permits the States to set Standards identical to EPA's, it does not require them to do so or to enforce such standards. No authority is given to EPA to delegate its enforcement authority to the States. Thus, EPA can only rely on State enforcement to the extent that the States do in fact enforce their own regulations, if any.

The House bill (HR 11021, 92nd Cong., 2d Sess.) provided for agreements between the States and the Administrator whereby the Administrator could authorize States to enforce the civil penalties that would have been imposed under that bill. §11(a) and (c). See H. Rep. 92-842, 92d Cong., 2d Sess. at 17-18: However, Congress deleted this approach in the Act. See §11.

The Noise Act does contain a citizen's suit provision which authorizes direct action against violators. However, such action can be commenced only after the Administrator of EPA and the violator have been given 60 days notice and prohibits such a suit if the Administrator is prosecuting a civil action to require compliance. The only possible purpose of the 60 day notice to the Administrator is to give him an opportunity to initiate the proposed enforcement action. This provision thus seems to contemplate citizen's suits against violators as an additional remedy to EPA enforcement rather than a substitute for EPA enforcement. There is no legislative history indicating that Congress did not intend the usual method of enforcing Federal standards i.e., federal enforcement, to apply in the Noise Act. As stated by Senator Tunney in explaining the final bill (Cong. Rec., Oct. 18, 1972, at S18645):

> "The following provisions have been included in the House Amendment in order to reflect similar provisions of the Senate bill:
>
> . . .
>
> An enforcement provision similar to the Clean Air Act;
> A citizen suit provision identical to the Clean Air Act;
> . . ."

Thus, the Noise Act should be enforced as federal emission standards are enforced under the Clean Air Act - by federal action. The Administrator's Safe Drinking Water bill is not relevant since that bill specifically provides in §5(a):

> "For the purposes of this Act, the States have primary enforcement responsibility except for Federal facilities which will comply with section 15(a). The Administrator shall monitor the activities of the States and public water systems only to the extent necessary to determine if States are establishing and maintaining an adequate program to enforce the national primary drinking water standards."

Furthermore, the citizen's suit provision in the Noise Act also provides for suits against the Administrator for failure to perform a nondiscretionary act or duty. §12(a)(2)(A). While the Administrator has some discretion with respect to how to allocate enforcement resources and whether a particular case warrants an enforcement action, there can be little doubt that a policy of no federal enforcement would be considered as beyond the Administrator's discretion.

A major problem exists in connection with the enforcement of §17 and §18 of the Act. Section 18(b) provides:

> "The Secretary of Transportation, after consultation with the Administrator shall promulgate regulations to insure compliance with all standards promulgated by the Administrator under this section. The Secretary of Transportation shall carry out such regulations through the use of his powers and duties of enforcement and inspection authorized by the Interstate Commerce Act and the Department of Transportation Act. Regulations promulgated under this section shall be subject to the provisions of sections 10, 11, 12, and 16 of this Act."

Section 17(b) is nearly identical.

The problem is that we have been informally advised by DOT counsel that the Interstate Commerce Act and the Department of Transportation Act do not provide penalties for violation of noise emission standards. Although §18(b) also references enforcement sections in the Noise Act, EPA's enforcement authority is given only to the Administrator of EPA. §11(d). Insofar as criminal penalties are sought for violation of §§17 and 18 standards, there is no problem since the Justice Department brings such action. However, §11 provides for criminal penalties only for "willfully or knowingly" violating EPA standards. Proving that a motor carrier or railroad "willfully or knowingly" emitted noise above the standard will in many cases be difficult, if not impossible. It is for this reason that the Office of General Counsel agreed to the inclusion of a muffler requirement and prohibition against pocket retreads in the standards. Even though these arguably are not the type of regulation envisioned under §18(a), they may be the only effective method of regulating motor carrier noise under §18, since a motor carrier can much more easily be proven to have knowingly violated this type of standard than a decibel limitation type of standard.

If DOT finally determines that they lack authority under the ICA or DOT Act to penalize violators of EPA's standards, the only recourse would be for DOT to require persons to comply with §§17 and 18 standards by requesting Justice to seek an injunction under §11(c) of the Noise Act or requesting the EPA Administrator to issue an order under §11(d) of the Noise Act. Such an order can only be issued after an adjudicatory hearing. §11(d)(2). Either a §11(c) or a §11(d) action is a cumbersome way to bring a particular truck or train into compliance.

However, when a railroad or motor carrier has many trains or trucks in violation of the standards, the §11(c) and (d) procedures could be an effective way of requiring the company to install necessary noise reduction controls on its equipment. Even in such case, it seems contrary to the intent of §18(b) of the Noise Act that the Administrator of EPA rather than the Secretary of DOT would have to hold the hearing and issue the order if §11(d) is used.

I have been advised that DOT counsel are working on this problem. Since §§17(b) and 18(b) of the Noise Act clearly contemplate that the Secretary of DOT has primary enforcement authority for §18 standards, it would be premature for this office to provide at this time a legal opinion concerning the appropriate means of enforcing §§17 and 18 standards.

§ § § § § § §

TITLE: Definition of "Best Available Technology"

DATE: July 5, 1973

QUESTION

What does the term "best available technology" mean as used in sections 17 and 18 of the Noise Control Act?

ANSWER

The term "best available technology" is not defined in the Act. The legislative history of the Act, however, indicates that phrase "best available technology" refers to either technology existing at the time regulations are issued or technology that can be developed by the effective date of the regulations. The determination of whether technology is "available" must include consideration of such practical issues as the capacity of industry to supply noise control devices and the durability of such products.

DISCUSSION

Sections 6, 17, and 18 of the Noise Control Act provide for the establishment of noise emission standards which reflect "the degree of noise reduction achievable through the application of the best available technology," taking into consideration "the cost of compliance." The Act, however, does not attempt to define these phrases.

The history of the Act in the House does not reveal the meaning of the phrase "best available technology" since that phrase was not a provision of the House bill. Section 5(c)(1) of the House bill required the Administrator to "give appropriate consideration to technological feasibility and economic costs (taking into account the useful life of the product and the feasibility and cost of requiring compliance with the standards during the useful life)" before establishing limits on noise emission from new products. The House bill did not contain any provision regarding either railroads or interstate motor carriers. The House Report implies that the phrase "technological feasibility" referred to the application of either present technology or reasonably attainable technology:

> The testimony received from a variety of witnesses indicated that most major sources of noise affecting the population of the United States have noise reduction potential that can be attained with application of today's technology.
>
> The Committee found that there is a lack of adequate information regarding the cost of noise control for some products and thus included in the bill the requirement that in establishing final standards for noise sources, appropriate consideration must be given to the economic costs of such standards. The Committee also fully expects that adequate consideration be given to the technical capability of industry to meet noise control requirements. H. Rep. 92-842, 92 Cong., 2d Sess., at 7.

Although the language of the House bill was replaced in the Act by the phrase "best available technology," it is not clear that the deletion was intended as a rejection of the concept of "technological feasibility." The Senate report merely uses the phrase "best available technology" without attempting to clarify its meaning in sections 17 and 18. With respect to noise emission standards for new products in section 6, however, the Senate report indicates that the Committee members did not believe that application of the "best available technology" would permit the immediate control of noise. The report implies instead that the Committee recognized that "best available" did not mean best possible technology:

> "While the intention of the whole bill is to protect public health and welfare from environmental noise, the Committee expects that the application of the best available technology will just begin to realize that goal in the foreseeable future." S. Rep. No. 92-1160, 92 Cong., 2d Sess., at 7.

A better indication of the meaning of the phrase "best available technology" is provided by the remarks of Senators in the Congressional Record. The remarks of Senator Boggs, a member of the Senate Committee which approved the bill, imply that the phrase referred to existing technology:

> "Building upon the experience of the Clean Air Act and the Federal Water Pollution Control Act, the Committee determined that rather than the vague and general test of protecting public health and welfare, it would be preferable to set standards for major sources of noise

> based on best available technology taking into account the cost of compliance. Witnesses before the committee indicated that in most cases the noise of major classes of products manufactured in the United States could be drastically reduced by the application of existing technology and that the cost of applying such technology would be comparatively reasonable." (emphasis added). 118 S. Jou. 17774 (Oct. 12, 1972).

The language of §§17(a)(4) and 18(a)(4) of the Act, however, indicate that nonexistent technology may be within the meaning of "best available technology" if such technology can be developed prior to the effective date of the regulations. Indeed, those sections provide that any regulations issued under §§17(a) or 18(a) shall become effective only after "such period as the Administrator finds necessary . . . to permit the development and application of the requisite technology . . ." (emphasis added). This language suggests that regulations may require undeveloped technology if a sufficient period for "development" is permitted prior to the date that they become effective.

In addition, the remarks of Senator Tunney, one of the chief proponents of the legislation, indicate that the phrase "best available technology" permits the Administrator to push the limits of the existing technology. The following remarks of Senator Tunney are particularly significant since they explain the changes made by the Conference Committee prior to the enactment of the bill in its final form:

> Additionally, the Administrator will be required to take into consideration the technology that is available to reduce noise. The Senate established its regulatory mechanism based on what could be achieved through the application of the best available technology. The Senate bill assumed that the best technology available would probably not be adequate to assure protection of public health and welfare and thus that the levels of noise reduction which could be achieved with technology would be the minimum level of control. Under the House amendment, the application of the best available technology remains the minimum standard, by providing for the establishment of standards based on both public health and welfare and the technology available for noise reduction. The Administrator will have an opportunity to assure that the best which can be done is done, while at the same time pushing the limits of technology to achieve greater noise emission control results protective of public health and welfare. 118 S. Jou. 18645-46 (Oct. 18, 1972).

The legislative history thus indicates that the phrase "best available technology" refers to either technology existing at the time regulations are issued or technology that can be developed by the effective date of the regulations. However, the legislative history leaves many important questions unanswered. There is no indication, for example, that the Administrator may consider the capacity of suppliers to distribute the technology in determining whether technology is "available." Furthermore, there is no indication that technology must be operationally proven or that a capability for adequate maintenance must exist.

Although the legislative history of one act is normally of limited usefulness in construing another act, the history of the Clean Air Act and the Federal Water Pollution Control Act may be relevant since Senator Boggs noted that the Noise Control Act was built upon the experience of those prior acts. The Senate Report on the FWPCA states:

> "As used in this bill the concept 'best available control technology' is intended to mean that the Administrator should examine the degree of effluent control that has been or can be achieved through the application of technology which is available or normally can be made available. This does not mean that the technology must be in actual routine use somewhere. It does mean that the technology must be available at a cost and at a time which the Administrator determines to be reasonable, and that the technology has been adequately demonstrated if not routinely applied." S. Rep. 92-414, 92 Cong., 1st Sess. at 51-57.

It seems significant that the Senate Report on the Clean Air Act uses nearly identical language to define the term "latest available control technology." S. Rep. 91-1196, 91st Cong., 2d Sess. at 16. In particular, the consistent use of a variation of the phrase "best available technology" by the Senate appears to be more than mere coincidence. The absence of a different definition in the legislative history of the Noise Control Act implies that the phrase "best available technology" may be interpreted by the EPA in a manner consistent with the interpretation of the phrase "best available control technology" in FWCPA or the phrase "latest available control technology" in the Senate Report on the Clean Air Act. Although this interpretation does not directly answer questions relating to the maintenance capability and the distributive capacity of manufacturers, the determination of whether technology is actually "available" must include a consideration of such practical issues.

It must be stressed that the determination of the Administrator that specific noise control equipment is or is not the "best available technology" must be supported on the record by adequate data. The recent decision of the Court of Appeals for the District of Columbia Circuit in Portland Cement Association v. Ruckelshaus, Civ. No. 72-1073 (June 29, 1973), is particularly relevant. In interpretating the phrase "the degree of emission limitation achievable [which] . . . the Administrator determines has been adequately demonstrated" of §111 of the Clean Air Act, the court stated that "it must be 'adequately demonstrated' that there will be 'available technology'." The court then suggested guidelines for determining whether technology is available:

> "The Administrator may make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on 'crystal ball' inquiry. . . . [T]he question of availability is partially dependent on 'lead time,' the time in which the technology will have to be available. Since the standards here put into effect will control new plants immediately, as opposed to one or two years in the future, the latitude of projection is correspondingly narrowed. If actual tests are not relied on, but instead a prediction is made, 'its case rests on the reliability of [the] prediction and the nature of [the] assumptions.' " Civ. No. 72-1073 (June 29, 1973), at 31.

Although these statements were made with respect to the meaning of the §111 of the Clean Air Act, it is apparent that the reasoning of the court is equally applicable to the determination of the availability of technology under sections 6, 17, and 18 of the Noise Control Act.

§ § § § § § §

TITLE: Authority of EPA Under Section 4(c) (Authority of Administrator to Coordinate and Review Federal Regulations Relating to Both Environmental and Occupational Noise)

DATE: July 13, 1973

QUESTION

Does EPA have authority to review occupational noise standards proposed by the Bureau of Mines?

ANSWER

Although the legislative history of section 4 of the Noise Control Act is ambiguous, it appears that Congress intended to confer upon the Administrator the authority to coordinate and review Federal occupational noise programs as well as environmental noise programs.

DISCUSSION

The language of section 4(c) of the Noise Control Act appears to confer authority upon the Administrator to coordinate and review Federal regulations relating to both environmental and occupational noise. That section does not attempt to differentiate between Federal programs relating to environmental noise and those relating to occupational noise. Section 4(c)(1) authorizes the Administrator to "coordinate the programs of all Federal agencies relating to noise research and noise control." Section 4(c)(2) directs each Federal agency to "consult with the Administrator in prescribing standards or regulations respecting noise." Section 4(c)(2) also authorizes the Administrator to request a Federal agency to review the advisability of revising noise standards if "the Administrator has reason to believe that a standard or regulation, or any proposed standard or regulation, of any Federal agency respecting noise does not protect the public health and welfare to the extent he believes to be required and feasible."

Although there does not appear to be any Congressional discussion of the authority of the Administrator with respect to occupational noise regulations, it may be inferred from the history of section 4 that a broad interpretation of the term "noise" was intended. In the original version of section 406(b) of S. 3342, the Administrator was authorized to coordinate all Federal programs relating to "noise pollution research and noise pollution control."

However, section 406(c)(1) was amended by the Senate Committee on Public Works, to limit the authority of the Administrator to Federal programs "relating to environmental noise research and environmental noise control." Section 406(c)(2) was amended to require Federal agencies to consult with the Administrator before "prescribing any regulations respecting environmental noise." On the other hand, that portion of section 406(c)(2) authorizing the Administrator to request a reconsideration was not expressly amended.

Although there is no express indication of the purpose of the insertion of the term "environmental noise," a reasonable inference is that the Committee intended to restrict the authority of the Administrator. The Senate Report, for example, implies that the Committee distinguished between "noise" and "environmental noise":

> "The Administrator also is authorized to coordinate all Federal agency programs related to environmental noise research and control. The Administrator is required to comment publicly on noise control programs and regulations established by other Federal agencies." S. Rep. No. 92-1160, 92d Cong., 2d Sess., at 15.

The quoted statement implies that the term "noise control" programs is broader, or at least different than the term "environmental noise" control.

The qualifying term "environmental," however, was deleted from the bill as finally enacted by an amendment proposed by the House. There are three possible interpretations of the purpose of this amendment: (1) the House may have thought that the term "environmental" was superfluous; (2) the House intended to broaden the authority of the Administrator; or (3) the deletion was unintentional. The House Report implies that the use of the term "environmental" was superfluous. Although section 4(b) of the House bill (H.R. 11021) did not qualify the term "respecting noise," the House Report acknowledges that an independent system of control has previously been established for occupational noise:

> There is a long history of occupational noise causing degrees of hearing impairment in some of the working population. Reports available to the Committee indicate that the number of persons engaged in occupations in which there exists a definite risk of hearing impairment may be as high as 16 million. The legal structure for the protection of workers now exists through the provisions of the Occupational Health and Safety Act and the Coal Mine Safety and Health Act. Although it has been estimated that nonoccupational noise hearing impairment of sufficient severity to require the use of a hearing aid for adequate comprehension of speech affects almost 3 million persons in the United States at the present time, these persons receive virtually no protection from such noise by federal law. H. Rep. No. 92-842, 92d Cong., 2d Sess., at 6.

On the other hand, the report elsewhere discusses the lack of coordination generally among Federal noise programs:

> The Committee found that due to the wide divergence of noise abatement programs within the Federal Government, the vast majority of Federal activities relating to noise have been conducted on an ad hoc basis. As a result, different systems of measurement of noise impact have been developed. Because of a demonstrated need for a comprehensive Federal effort, the bill places responsibility on the Administrator of the Environmental Protection Agency for the coordination of programs of all departments and agencies, rather than merely promoting such coordination as proposed in the Administration's bill. The Committee anticipates that suitable mechanisms for effective exchange of information will be achieved and expects that greater joint participation of the principal agencies in research efforts and suitable arrangements for joint utilization of facilities for research will be achieved. H. Rep. No. 92-842, 92d Cong., 2d Sess., at 7.

Since these comments do not attempt to differentiate between occupational and nonoccupational noise, it is not clear that the House intended to restrict the authority of the Administrator to nonoccupational noise programs. It is possible to infer, therefore, that the term "respecting noise" includes both environmental and occupational noise. It is also conceivable that the deletion of the word "environmental" was inadvertent since there was no discussion of the purpose of the deletion.

Although all of these inferences are possible, the most reasonable inference appears to be that the House intended to broaden the review authority of the Administrator to occupational noise programs. This interpretation seems the most reasonable since there is a presumption that the deletion was made intentionally and that it had an effect upon the meaning of the legislation.

Moreover, the Bureau of Mines has apparently concluded that section 4(c) of the Noise Control Act confers the Administrator with authority to coordinate and comment upon occupational noise programs. In a letter to Mr. Rucke'shaus, dated March 13, 1973, the Acting Director of the Bureau of Mines, Paul Zinner, wrote:

> "Pursuant to Section 4(c)(2) of the Noise Control Act, we are submitting a copy of the proposed noise standards for metal and nonmetal mines."

Mr. Zinner apparently believed that the consultation requirements of section 4(c)(2) applied to occupational noise regulations issued by the Bureau of Mines. Section 4(c)(2) confers similar authority upon the Administrator to request that the Bureau of Mines review the advisability of revising its occupational noise standard in order to protect the public health and welfare.

The Administrator, therefore, has the authority to request the Bureau of Mines to review the advisability of revising the proposed noise standard for metal and nonmetal mines. Such a request may be made if the Administrator has reason to believe that the standard does not protect the public health and welfare. Section 4(c)(2) provides that "the request may be published in the Federal Register and shall be accompanied by a detailed statement of the information on which it is based." The detailed statement should indicate the reasons that the Administrator believes that the proposed standard fails to protect the public health and welfare. In the event that the Administrator makes such a request, the Bureau of Mines must submit a report to the Administrator within the time specified by him. However, the time specified cannot be less than ninety days from the date of the request. This report must be published in the Federal Register and accompanied by a detailed statement of the conclusions of the agency.

It should be emphasized that section 4(c)(2) does not require the Administrator to formally request reconsideration of noise standards. Section 4(c)(2) provides instead that the Administrator "may" request reconsideration and that any such request "may" be published in the Federal Register. The Administrator, therefore, has the discretion to make such a request informally. In most instances an informal request will be sufficient. Therefore, the Administrator's request for reconsideration should generally be made informally. If the agency involved ignores or fails to respond adequately to the Administrator's request, consideration can then be given to publishing his request in the Federal Register.

§ § § § § § §

TITLE: Health and Welfare Criteria for Section 18

DATE: August 15, 1973

QUESTION

Do Sections 17(a) or 18(a) of the Noise Control Act require a showing that proposed noise emission standards for interstate railroads or interstate motor carriers will directly benefit the health and welfare of the public?

ANSWER

Noise emission regulations for interstate railroads and motor carriers must be based upon the best available technology, taking into consideration the cost of compliance. There need not be a demonstration that these standards will directly benefit public health and welfare.

DISCUSSION

Sections 17 and 18 of the Noise Control Act do not require the Administrator to consider the public health and welfare in setting limits on noise emissions from the operation of interstate motor carriers or railroads. Section 18(a)(1) merely directs the Administrator to publish proposed "noise emission standards setting such limits on noise emissions resulting from operation of motor carriers engaged in interstate commerce which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance." (emphasis added). Section 17(a)(1) provides for the regulation of noise emissions from interstate railroads in nearly identical language.

Where Congress wished for EPA to consider the health and welfare effects of its standards it specifically so stated. For example, Section 6(c)(1) of the Noise Act provides that new products standards shall be, inter alia, "requisite to protect the public health and welfare". See also §7(c)(1) which requires EPA to propose to the FAA such regulations for aircraft "as EPA determines is necessary to protect the public health and welfare." The reasoning behind standards based on technology and cost rather than health and welfare is set forth in the Senate Report.

> Standards for new products[1] are required to set limits on noise emissions which in the Administrator's judgment reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. The difficulty of relating noise emissions from a given source to effects on public health and welfare in an enforceable way, when standards are to be set on a national basis without control of the circumstances of use or the number of products in a given area, led the Committee to conclude that implementation of a technologically-based standard was preferable in terms of uniformity and enforceability to one calling for protection of the public health and welfare. While the intention of the whole bill is to protect public health and welfare from environmental noise, the Committee expects that the application of the best available technology will just begin to realize that goal in the foreseeable future. S. Rep. No. 92-1160, 92nd Cong., 2d Sess., at 6-7.[2]

The only legislative history that indicates that EPA should consider health and welfare effects in §§17 and 18 standards is a remark made by Senator Tunney, the bill's sponsor on the floor of the Senate at the time the final bill was approved by the Senate. Senator Tunney said in discussing the pre-emptive effect of §§17 and 18:

> Second, the House has accepted the Senate proposal which authorizes the Environmental Protection Agency to establish regulations for control of noise from interstate carriers, including railroads, trucks and buses.

---

[1] The language quoted references new products standards, which in the Senate bill (S 3342) were required to "reflect[s] the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance." §408(c)(1). This section was later amended to include health and welfare considerations and became Section 6 of the Act. The report is quoted for reasoning, not as §§17 and 18 history.

[2] See also Senator Boggs comments to same effect at 118, 17774 (October 12, 1972).

> The purpose of the amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers. I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect. And, equally important, Mr. President, is that Federal regulations must be stringent enough to meet the varying local conditions affected by interstate carriers. Not only must the Administrator establish regulations which protect public health and welfare from noise from these interstate carriers in the average situation but he must also design his regulations so that the public health and welfare is protected regardless of the location in which the interstate carrier is operating. 118 S. Jou. 18645 (Oct. 18, 1972).

Senator Tunney's comments concerning health and welfare are clearly at variance with the words of the statute. However, it should be kept in mind that the Noise Act was passed by unanimous consent on the last day of the 1972 Senate session during the usual last minute flurry of legislative work and his remarks may not have been well prepared. Furthermore, the quote addresses the preemption issue and is not focused on the proper basis for §§17 and 18 standards. Senator Tunney seems to have been trying to assure both those Senators who were concerned about relieving interstate commerce of conflicting local noise laws and those who were concerned about protecting the public health and welfare that the bill would accomplish both goals. Accordingly, we believe that the words of the statute should prevail over Senator Tunney's remarks.

§ § § § § § §

TITLE: Pre-emption

DATE: August 24, 1973

QUESTION

What is the pre-emptive effect of regulations issued under the regulatory sections of the Noise Control Act?

ANSWER

Section 6:

Once a noise emission regulation has been promulgated by EPA pursuant to §6 of the Noise Control Act, the authority of states and local governments to adopt or enforce limits on noise emissions for new products is pre-empted, unless the state or local regulation is identical to that adopted by the Administrator. States and localities may control environmental noise by regulating the use of any product, including a product covered by Federal noise emission regulations. However, state restriction on use which is so broad as to be effectively a restriction on the sale of a new product probably would be invalid.

Section 7:

The authority of states and localities to control aircraft noise through their police power has been completely pre-empted by the Federal Aviation Act and the Noise Control Act. There is still some question regarding the extent to which airport operators can regulate airport noise through their proprietary authority.

Section 8:

After the effective date of Federal labeling regulations adopted under §8, states are only prohibited from regulating labeling in a manner which conflicts with Federal requirements.

Sections 17 and 18:

On their effective dates, the noise emission regulations adopted by EPA pursuant to §§17 or 18 pre-empt the authority of states and local governments to regulate noise emissions resulting from the operation of interstate railroads or interstate motor carriers, unless the state or local regulation is identical to that adopted by EPA. States and localities may, however, regulate the levels of environmental noise or control the use of any product if the Administrator determines the state or local regulation is necessitated by special local conditions and is not in conflict with regulations promulgated under §§17 or 18.

DISCUSSION

Section 6:

Section 6(a) of the Noise Control Act directs EPA to prescribe noise emission standards applicable to new products which are major sources of noise, for which noise standards are feasible and which fall into one of the following categories: 1) construction equipment; 2) transportation equipment (including recreational vehicles and related equipment); 3) any motor or engine (including any equipment of which an engine or motor is an integral part); 4) electrical or electronic equipment.

Section 6(b) authorizes the Administrator to adopt regulations for other products for which noise emission standards are feasible and necessary to protect public health and welfare.

Section 6(e)(1) provides that the noise emission regulations adopted under §6 shall have the following pre-emptive effect:

> No State or political subdivision thereof may adopt or enforce--
>
> (A) with respect to any new product for which a regulations has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or

> (B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.
>
> (2) Subject to section 17 and 18, nothing in this section precludes or denies the right of any State or political subdivision thereof to establish or enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.

It is clear from the Act that after the promulgation of Federal regulations, no State or city may adopt or enforce any noise emission regulation applicable to any new product unless such regulation is identical to the Federal regulation. Prior to the promulgation of Federal regulations by EPA, there is no restriction on State or local regulation. Even after promulgation of EPA regulations covering a product, States and municipalities retain wide authority to control noise resulting from the use of the same product. Techniques available for this purpose include: speed and load limits, curfews on the use of noisy products, zoning restrictions, boundary line restrictions, and similar restrictions.

There are still unresolved questions concerning the extent of State authority under the Act. For example, it is not clear to what extent States and municipalities can prescribe decibel limits on the use of products once they are in the hands of consumers. Although §6(e)(2) of the Act seems to leave the States with unlimited authority to regulate use of products, a decibel limit on use of a product is effectively a prohibition on the sale of such a product with higher decibel emissions when the noise emitted is not within the control of the user. For example, consumers will be reluctant to purchase a snowmobile that emits more than 85 decibels in a State which prohibits the use of any snowmobile which emits more than 85 decibels. A similar effect would result from State regulations that prohibited the use of a product meeting Federal noise standards in a way or at the times such a product is ordinarily used, unless the product met lower noise levels.

Unfortunately, the legislative history of §6 is somewhat ambiguous regarding the propriety of use regulations which have the practical effect of emission limitations. The pre-emption provision of §6 was proposed in approximately its final form as §6(d) of the House Bill, H.R. 11021. The House Report explained the pre-emptive operation of that section as follows:

> Section 6 of the Committee's bill affects the authority of States and political subdivisions over noise emissions only in one respect: States and local governments are pre-empted from prescribing noise emission standards for new products to which Federal standards apply, unless their standards are identical to the Federal standards. A similar provision applies to component parts. For products other than new products to which Federal standards apply, State and local governments attain exactly the same authority they would have in the absence of the standards setting the provisions of the bill. The authority of State and local government to regulate use, operation, or movement of products is not affected at all by the bill.

> Nothing in the bill authorizes or prohibits a State from enacting State law respecting testing procedures. Any testing procedures incorporated into the Federal regulations must, however, be adopted by the State in order for its regulations to be considered identical to Federal regulations.
>
> Localities are not pre-empted from the use of their well-established powers to engage in zoning, land-use planning, curfews and other similar plans. For example, the recently enacted Chicago Noise Ordinance provides that heavy equipment for construction may not be used between 9:30 p.m. and 8:00 a.m. within 600 feet of a hospital or residence except for public improvement or public service utility work. The ordinance further provides that the motor of a vehicle in excess of 4 tons standing on private property and within 150 feet within residential property may not be operated for more than two consecutive minutes unless within a completely enclosed structure. Such local provisions would not be pre-empted by the Federal government by virtue of the purported bill. H. Rep. No. 92-842, 92nd Cong., 2d Sess., at 8-9.

The reference in the House Report to the Chicago ordinance indicates that States and localities are free to prohibit the use of noisy products during specified hours.

Although the report does not indicate whether States can completely prohibit all uses of a noisy product, a statement made by Congressman Rogers in response to a question raised by Congressman Eckhardt indicates that a total prohibition is permissable. Congressman Rogers is chairman of the subcommittee which held hearings on the noise legislation. The following exchange took place:

> Mr. Eckhardt. Now suppose the State of Texas should attempt to accomplish essentially the same thing as the [hypothetical] New York statute concerning pile drivers was intended to accomplish, but suppose the Texas statute controlled use instead of production or as sembly. Thus, Texas provides that no pile driver shall be used within the confines of the State of Texas which has a noise emission level above a certain number of decibels. Could the State so regulate?
>
> Mr. Rogers. Yes. Though a noise emission limit is provided, it is not applied in the area this bill is designed to control; that is, primarily the manufacture of equipment with a certain noise potential. The pre-emption provision in section 6(d)(1) [now 6(e) (1)] applies only to State regulation of "new products" and "new product" is defined in section 3.
>
> Of course, we do know all of this would have to bear any constitution overview as to the commerce clause and requirements that statutes be reasonable and not a burden on interstate commerce. (Cong. Rec., p. H1515, February 29, 1972).

This discussion supports the proposition that States can prohibit the use of products regardless of the effect on sales of new products.

On the other hand, the legislative history of the pre-emption provision in the Senate provides some support for the opposite position. Section 408(d) of the Senate bill prohibited, after the effective date of a Federal standard, any State or local standard on noise emissions of a product which was "enforceable against the manufacturer." (See 118 Cong. Rec. S17745-46, October 12, 1972). The prohibition of only those local regulations which are "enforceable against the manufacturer" suggests that States may set use limits which discourage the sale of new products which emit noise in excess of the local regulation. However, in the report of the Senate Committee on Public Works which accompanied the bill to the Senate floor, the Committee stated:

> Subsection 408(d) of the bill deals with the responsibilities of the Federal government and State and local governments in controlling noise. For any product manufactured after the effective date of an applicable Federal standard, authority to establish noise emission standards for the manufacturer is pre-empted. States and cities, however, retain complete authority to establish and enforce limits on environmental noise through the licensing, regulations, or restriction of the use, operation, or movement of a product, or concentration or combination of products.
>
> It is the intention of the Committee to distinguish between burdens which fall on the manufacturers of products in interstate commerce and burdens which may be imposed on the users of such products. In the judgment of the Committee, noise emission standards for products which must be met by manufacturers, whether applicable at the point of introduction into commerce or at any other point, should be uniform.
>
> . . .
>
> At a minimum, States and local governments may reach or maintain levels of environmental noise which they desire through (a) operation limits or regulations on products in use (such as speed or load limits or prohibitions of use in given areas or during given hours); (b) quantitative limits on environmental noise in a given area which may be enforced against any source within the area, including zones adjacent to streets and highways; (c) regulations limiting the environmental noise which may exist at the boundary of a construction site; (d) nuisance laws; or (e) other devices tailored to the needs of differing localities and land uses which do not amount to a burden manufacturers must meet to continue in business. Sen. Rep. No. 92-1160, 92nd Cong., 2d Sess., at 7-8.

The references in the Senate report to pre-emption of standards enforceable "indirectly against the manufacturer" and of standards "which must be met by manufacturers, whether applicable at the point of introduction into commerce or at any other point" suggest that the Senate did not intend to permit the States to set standards which would discourage or eliminate the sale of new products meeting Federal standards.

The pre-emptive language of §6(e) as finally adopted reflects the broad language of the House bill. Unfortunately, there was no discussion of the meaning of the final pre-emptive language. The incorporation of the broad language of the House bill implies that the section should be given an interpretation that is consistent with the statement made by Congressman Rogers. On the other hand, the deletion of the language in §6(e)(1) of the Senate bill which had limited pre-emption to State regulations "enforceable against the manufacturer" suggests that the final Act pre-empts use regulations which would indirectly eliminate or discourage sales of new products.

Since the legislative history of §6(e) is somewhat ambiguous it is difficult to predict with any certainty how the courts would construe the pre-emptive provisions. However, a case which will undoubtedly influence the determination is Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120 (S.D. N.Y. 1972). In that suit several corporations challenged a New York City ordinance which required taxicabs to be equipped with emission control devices. The ordinance was challenged on the ground that it violated §209 of the Clean Air Act which prohibits States from regulating exhaust emissions for new motor vehicles. Section 209(c), however, expressly authorized State use regulations in language very similar to §6(e)(2) of the Noise Control Act:

> (c) Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

Moreover, §213(3) of the Clean Air Act defined the term "new motor vehicle" as a motor vehicle "the equitable or legal title to which has never been transferred to an ultimate purchaser." (The definition of "new product" in §3(5)(A) of the Noise Control Act is identical). Even though the city emission limitation may have indirectly discouraged the sale of new motor vehicles as taxicabs, the court held that the ordinance was not pre-empted by §209 of the Clean Air Act. However, the court warned that the imposition of State emission standards immediately after a new car is bought and registered "would be an obvious circumvention of the Clean Air Act and would defeat the Congressional purpose of preventing obstruction to interstate commerce." On the other hand, the court stated that State emission requirements "upon the resale and reregistration of the automobile" or "for the licensing vehicles for commercial use within that locality" would not be pre-empted.

Thus the Court in Allway Taxi recognized that a restriction which does not apply before or at the sale may have such an adverse effect upon sales as to be invalid under the pre-emption provisions relating to "new motor vehicles." Yet the Court found no such effect even when all taxicabs in

New York City were subject to the local restriction. Other cases have tended to construe pre-emptive provisions narrowly.*/

We conclude that broad State and local use restrictions are permissible under §6, but that use restrictions which effectively discourage the sale of all new products covered by Federal regulations would probably be invalid. Because the practical effect of a use restriction rather than the "nature" of the restriction will probably be determinative, the validity of such restrictions will have to be considered in light of the extent of the restriction, the ordinary use of the product, the effect of the restriction on interstate commerce, and related facts. No general rule is possible.

Section 7:

Section 7(b) of the Noise Control Act, which amends §611 of the Federal Aviation Act, provides that the FAA, after consulting with EPA, shall provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension or revocation of any certificate authorized by [the Federal Aviation Act]." Although §611 of the Federal Aviation Act does not contain any pre-emptive language, the Supreme Court of the United States in the City of Burbank v. Lockheed Air Terminal Inc., U.S. 93-S.Ct. 1854 (1973), held that the pervasive nature of Federal regulation of aircraft noise pre-empts the authority of States and local jurisdictions to adopt or enforce regulations controlling aircraft noise under their police power. At issue in that suit was the validity of an ordinance of the City of Burbank which prohibited jet aircraft from taking off between the hours of 11 p.m. and 11 a.m. from an airport owned by Lockheed. Although the Court recognized that the control of noise has traditionally been within the police power of the States, the Court held that the pervasive control vested in EPA and the FAA under the Noise Control Act "seems to us to leave no room for local curfews or other local controls." The opinion further declared that a uniform and exclusive system of Federal regulation is necessary because of the interdependence of safety and the control of noise pollution.

In light of the recent decision in City of Burbank v. Lockheed Air Terminal, supra, it is clear that State and local government are completely preempted from adopting or enforcing regulations to control aircraft noise under their police power. The authority of States and local governments is preempted whether or not the Federal government has in fact adopted any regulations controlling aircraft noise.

---

*/ See, e.g., Askew v. American Waterways Operators, Inc., U.S. ___, 93 S.Ct. 1590 (1973); Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir., 1969); Exxon Corp. v. City of New York, ___ F.Supp. __, Civ. No. 73-1093 (S.D.N.Y. 1973).

However, in a footnote to the majority opinion, Justice Douglas suggested that localities may have proprietary authority as airport owners to control airport noise.*/ Since Justice Douglas failed to indicate the types of measures that could be taken by airport operators under their proprietary authority, it is impossible at this time to determine whether the police power-proprietary distinction is really meaningful. The fact that Justice Douglas reserved the right to rule upon "what limits if any apply to a municipality as a proprietor" suggests that the proprietary authority may also be held in the future to have been pre-empted by the pervasive nature of Federal airport noise regulations.

Section 8:

Section 8 authorizes Federal noise labeling requirements for products which emit noise capable of adversely affecting the public health or welfare or which are sold on the basis of their effectiveness in reducing noise. Section 8(c) provides:

> This section does not prevent any State or political subdivision thereof from regulating product labeling or information respecting products in any way not in conflict with regulations prescribed by the Administrator under this section.

Section 8 thus leaves the States with considerable power in the area of labeling. Prior to the promulgation of Federal labeling requirements, States and municipalities may regulate labeling in any manner desired. After the effective date of Federal regulations, States are only prohibited from regulating labeling in a way which conflicts with Federal requirements. Thus, for example, a Federal regulation requiring manufacturers to place a label on the product specifying the noise emission level of the product in decibels would not preclude a State regulation requiring manufacturers to indicate that the high noise level might impair the buyers hearing after a specified amount of time near the product. The States, therefore, have wide authority in this area.

Sections 17 and 18:

Sections 17 and 18 direct the Administrator to promulgate noise emission regulations for interstate railroads and interstate motor carriers. Noise emission regulations adopted by EPA pursuant to §§17 and 18 must include limits on noise emissions that are based upon "best available technology, taking into account the cost of compliance."

Section 17(c)(1) provides for Federal pre-emption in the following language:

> . . . After the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment of facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt

---

*/ ____ U.S. ____, 93 S.Ct. 1854, at 1861 n. 14.

> or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to emissions resulting from such operation prescribed by any regulation under this section.

The pre-emptive provision of §18(c)(1) is nearly identical to that of §17 (c)(1) except that §18(c)(1) prohibits state and local regulations "applicable to the same operation of such motor carrier" while §17(c)(1) forbids the adoption of regulations "applicable to noise emissions resulting from operation of the same equipment or facility of such carrier." Since the legislative history does not indicate whether the use of different phrases was intentional, the words of each section should be construed literally.

Section 17(c)(1), therefore, pre-empts only regulations that apply to "operation of the same equipment or facility". However, this leaves open the question whether local regulation of greater or smaller units of equipment or facilities than are covered by Federal regulations would be pre-empted. For example, if Federal standards exist for locomotives, can local governments regulate brake noise or noise from the entire train?

Section 18(c)(1) applies to all State and local regulations applicable to the "same operation" covered by Federal regulations. The question here is what is the "same operation" of a motor carrier? For example, it is not clear whether EPA, by the adoption of noise emission standards for those trucks with a gross vehicle weight rating over 10,000 pounds, has preempted the States from regulating the operation of trucks weighing less than 10,000 pounds.

In our opinion, the question of what is the "same operation" or "operation of the same equipment or facility" will be influenced greatly by EPA statements concerning what it believes its regulations cover. Therefore, EPA should state [when promulgating regulations] what particular operation or equipment it intends to cover by its regulations. For example, if EPA promulgates a regulation under §18 limiting noise emissions only from trucks over 10,000 lbs., it should state the reason it did not regulate noise emissions from trucks under 10,000 lbs. EPA should indicate whether it believes that such trucks do not need regulation, in which case there should be pre-emption, or whether noise from such trucks is essentially a local problem, in which case there should not be pre-emption.

The position that EPA's statements will be controlling is supported by Chrysler Corporation v. Tofany, 419 F.2d 499 (2d Cir. 1969). In Tofany, the U. S. Court of Appeals had to interpret the pre-emptive language of the Federal Motor Safety Act, which is similar to §§17(c)(1) and 18(c)(1). Section 1392(d) of the Federal Motor Vehicle Safety Act provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to con-

> tinue in effect, with respect to any motor vehicle or *item of motor vehicle equipment* any safety standard applicable to the *same aspect of performance of* such vehicle or item of equipment *which is not identical to the* Federal standard. (emphasis added.)

The Court interpreted the phrases "item of motor vehicle equipment" and "same aspect of performance" narrowly. The court concluded that Federal regulation of lighting generally did not preclude State regulation of a specific type of auxiliary lighting. In reaching this conclusion, the court heavily relied on the fact that the Federal Highway Administration never intended to deal with that specific type of auxiliary lighting. The court quoted the decision of the U.S. Supreme Court in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969), for the proposition that the administrative interpretation of a regulation is controlling unless plainly erroneous. *Tofany* and *Thorpe* thus indicate that EPA's statements regarding the pre-emptive effect of regulations implementing §§17 and 18 will be controlling. However, EPA's statements will not be dispositive if a court believes that the State or local regulations impose an undue burden upon interstate commerce.

Assuming that a State or local regulation would be pre-empted by the terms of §§17(c)(1) or 18(c)(1), a State or locality may apply for an exemption under §§17(c)(2) or 18(c)(2). Sections 17(c)(2) and 18(c)(2) provide in identical language as follows:

> Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

The term "not in conflict" must be construed in accordance with the purpose of §17(c) and §18(c), *i.e.* to avoid undue burdens on interstate commerce.*/ Thus §§17(c)(2) and 18(c)(2) determinations will have to be made by balancing local needs against the impact local regulation will have on interstate commerce. In view of recent judicial decisions affecting EPA actions, we believe that any reasonable determination by the Administrator which takes both of these factors into account will be sustained *if* the Administrator clearly articulates his reasoning.

Thus, EPA can to a great extent control the pre-emptive effect of its regulations under §§17 and 18 by (1) explaining the pre-emptive effect EPA believes its regulations should have and (2) granting exemptions under §§17(c)(2) and 18(c)(2).

---

*/ Congress' intent in enacting the preemption sections was clearly to minimize the burden on interstate commerce. See 118 Cong. Rec. S17777, S18002-03 (October 12 and 13, 1972).

SECTION III RADIATION

ENVIRONMENTAL RADIATION

TITLE: Definition of "Generally Applicable Environmental Radiation Standards"

DATE: July 20, 1972

It has come to my attention that some ORP staff may believe that the authority transferred from AEC to EPA to set "generally applicable environmental radiation standards" for the protection of the general environment from radioactive materials limits EPA to settling only one type of standard, e.g., ambient or exposure limits unrelated to class of activity.

There is no definition of this term in the Atomic Energy Act of 1954, nor the regulations implementing that Act, nor is there any precedent which can be relied upon to define the meaning of this term. Since the definition of the term is essentially a matter of defining the relative responsibilities between two Federal Government agencies (AEC and EPA) the proper definition will ultimately have to be settled with the Executive Branch.

Thus, I would suggest that the definition of this term be decided in the first instance by a policy decision on the part of EPA with respect to the type of standard that it deems most desirable for protecting the public health and the environment. The next step in the definition of the term would be to discuss with AEC EPA's preferred approach to setting radiation standards. Finally, if the AEC disagrees with EPA's interpretation, the matter would probably be settled by CEQ, OMB, or the White House.

In my opinion, efforts made to determine EPA's position by first attempting to ascertain what the words "general applicable environmental standards" "really mean" in some dictionary sense, would be a wasted effort and, could unnecessarily constrain EPA's efforts in environmental radiation protection.

I have been involved in attempts to define this term for over a year now. Such attempts included involved negotiations with the AEC. At no time have I seen any persuasive or even strong evidence of what this term "really means." The AEC at one time argued that the term should mean standards of the type published by the AEC in Part 20 of its regulations. These standards are not related to specific classes of activity. However, the AEC withdrew from this position and in its Federal Register notice publishing Proposed Standards for Light-Water Cooled Reactors noted that "EPA has under consideration generally applicable environmental standards for these types of power reactors". Thus, the AEC, the agency which has the greatest interest in this matter besides EPA, apparently concluded that "generally applicable environmental standards" could be established for different classes of activity.

The purpose of this memorandum is not to recommend any particular approach to setting radiation standards. On the contrary, I simply wish to make it clear that EPA has considerable latitude with respect to the type of radiation standard that it may set under the authority transferred from the AEC.

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

TITLE: Interpretation of the Federal Water Pollution Control Act

DATE: February 12, 1973

QUESTION

In a hypothetical case, an industry has a waste discharge into a navigable water for which a permit has been issued pursuant to Section 402. The discharger intends to combine the discharge from a new facility which would qualify as such under Section 306 with that of the existing facility, resulting either in an augmentation in flow of the present discharge or in the deterioration in quality of that discharge. Query: Can this new facility be considered a "new facility" to which standards of performance adopted under Section 306 and the NEPA requirements of Section 511(c) would apply (assuming that regulations already have been promulgated under Section 306 setting standards of performance applicable to a category which would include the new discharge)?

ANSWER

If the facility qualifies as a "new source" as defined in §306(a)(2), then the standards of performance adopted under §306 and the NEPA requirements of §511(c) would be applicable to the portion of the combined discharge attributable to the new facility. Whether the new facility is considered to be a "new source" subject to §306 and the NEPA requirements of §511(c), or instead merely a modification of the existing source (which would not be subject to §306 and NEPA), would have to be determined in light of the particular facts of each case. The fact that the discharge from the new facility is combined with the discharge from an existing facility would not necessarily disqualify the new facility from the status of a "new source."

QUESTION

Prior to issuing a compliance order pursuant to Section 309, must we hold a hearing, presumably an adjudicatory hearing? If not, does the recipient of a compliance order issued under Section 309 have any right of administrative or judicial review of such order, or must the recipient wait until he is charged with a violation of the order under Section 309(d), at which time he presumably would be entitled to a trial de novo?

ANSWER

An adjudicatory hearing is required by the Administrative Procedure Act §554, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing...." Section 309 of the FWPCA contains no requirement of a hearing prior to the issuance of the order. In the Senate Report Congress indicates its intent that a hearing not be required:

> "The bill, therefore, deletes the cumbersome conference and hearing procedures in the existing law. Such Administrative procedures were appropriate when the control program was based on ambient water quality and would serve no purpose except delay in an enforcement program based on effluent control." [S. Rep. No. 92-414 at p. 64]

In the absence of a provision in the FWPCA requiring a hearing, none is required by the APA.

The question remains whether the recipient of a compliance order would have an immediate right of administrative or judicial review, or whether he should have to wait until he is charged with a violation of the order under §309(d). In my view, the recipient of a compliance order would have an immediate right of judicial review, under the Administrative Procedure Act, if the Administrator failed to bring an enforcement action. The recipient of such an order would be faced with the choice of making the expenditures necessary to achieve compliance, or risking liability for a civil penalty under §309(d). This should be a sufficient predicate for judicial review at the instance of the recipient, if the Administrator fails to institute enforcement proceedings. See Abbot Laboratories v. Gardner 387 U.S. 136. In the absence of an administrative hearing, judicial review would be de novo.

QUESTION

The memorandum prepared by the Legal Support Division dated November 9, 1972, indicated (at page 69) that certification under Section 21(b) of the old Federal Water Pollution Control Act did not appear to satisfy the requirements of Section 401. Will it therefore be necessary to secure new cer-certifications under Section 401 for those permit applications which have already received certification under Section 21(b), or does the savings clause in the Act (Section 4) preserve the effectiveness of such certifications?

ANSWER

The Agency has reached the following decision concerning the continuing force of certification made by the state under §21(b) of the old FWPCA:

(a) If the permit was issued before October 18, 1972, both the permit and the certificate are valid.

(b) If the application was in hand, but the state had not yet certified by October 18, a new certification is necessary.

(c) If the state had certified with respect to the old application, but a permit has not yet issued, the state is given an election, within certain time limits, as to whether it will issue a new certification. If the state decides not to issue a new certification, then any additional certification requirements under §401 are deemed to have been waived.

QUESTION

Section 401(a)(1) provides that before a State can issue a certification for a permit application under Section 402, it must find that the discharge covered by the application complies with the applicable provisions of Section 301, 302, 306, and 307. Section 401 further provides that in the case of any such activity for which there is not an effluent limitation, or other limitation under Sections 301(b) and 302, and there is not an applicable standard under Sections 306 and 307, the State shall so certify. Assuming that no "limitations" under Sections 301 and 302 or "standards" under Sections 306 and 307 exist, to what does the State certify? Does the State merely "certify" that no applicable limitations or standards presently exist (and return the application to EPA without certification), or does it issue a formal certification? If the proper statutory procedure is merely to certify that no limits or standards exist, does this amount to a waiver by the State (in which case EPA presumably would not be required to file an EIS prior to issuance of a permit)?

ANSWER

EPA's obligation under §511(c)(1) to prepare an environmental impact statement for new source permits (where a "major Federal action significantly affecting the quality of the human environment" is involved) is not dependent on the existence or type of State certification under §401. Thus, from this standpoint, there is no need to characterize the State's certification. Moreover, a new source exists only where there is an applicable new source performance standard (see §306(a)(2)). Thus in the case of a new source permit, there should not ordinarily be a State certification of "no applicable standard."

§ § § § § § §

TITLE: Technical Comments on S. 2770

DATE: November 29, 1971

We have prepared the following technical comments on S. 2770 as passed:

§102(b)

This section, dealing with the subject of water quality storage, makes two important changes from its predecessor, Section 3(b) of the FWPCA. Section 3(b) apparently applied only to federally-built projects, while the new Section appears to cover all federally-licensed projects. The second change is that Section 3(b) gave the federal agency building the project authority to determine the need for water quality storage, while the new bill gives that authority to EPA.

In light of these changes, Section 102(b)(2) is ambiguous. Does it mean that for a privately-built project under FPC license, EPA is to make the determination of the need for water quality storage? This is what the first clause of subsection (2) seems to say. But the second clause, by referring to "any report or presentation to Congress," might be interpreted to limit the scope of the subsection to federally-built projects requiring Congressional authorization. Depending on what is intended regarding the scope of 102(b)(2), it should be amended to read either:

> "The need for and the value of storage for such purpose shall be determined by the Administrator. In the case of a project built by a Federal agency under Congressional authorization, the Administrator's views on these matters shall be set forth in any report ***."
>
> or:
>
> "In the case of a project built by a Federal agency under Congressional authorization, the need for and the value of storage for such purpose shall be determined by the Administrator, and his views on these matters shall be set forth in any report ***."

If the latter alternative is taken, then the FPC would be making the determinations regarding water quality storage for private projects under federal license--as is the case under present law. In that event, 102(b)(3) would have to be amended to eliminate the two references to the Administrator. If the former alternative is adopted, some provision would have to be made for EPA participation as a decision-maker in FPC hydroelectric project licensing proceedings.

§301

1. §301(b)

By couching its requirement in terms of a "not later than" date, this section could produce a hiatus in enforcement activities until January 1, 1976. An additional hiatus could occur between 1976 and 1981 with respect to the more stringent standards of §309(b)(2). To avoid any such implication, section 309(b) should be redrafted to require compliance" as soon as possible" but in no event no later than January 1, 1976. Without this amendment there will be a strong tendency on the part of industry, and perhaps a Court, to view the 1976 and 1981 dates as deadlines not requiring earlier compliance with the standards of treatment required by section 301(b), if that is possible. Therefore, section 301(b) should be revised as follows:

> "(b) In order to carry out the purposes of this Act there shall be achieved--
>
> "(1)(A) as soon as possible, but in no event later than January 1, 1976, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available***(etc.) and
>
> "(B) as soon as possible, but in no event later than January 1, 1976, for publicly owned treatment works in existence, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,
>
> "(C) as soon as possible, but in no event later than January 1, 1976, any more stringent effluent limitation, treatment standards, or schedule of compliance established pursuant to any other State or Federal law or regulation***(etc.).
>
> "(2)(A) as soon as possible after January 1976, but in no event later than January 1, 1981, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the elimination of the discharge of pollutants, ***(etc.): and
>
> "(B) as soon as possible after January 1, 1976, but in no event later than January 1, 1981, compliance with the requirements established under section 201(d) of this Act for publicly owned treatment works."

2. §§301(b)(1)(A)(ii) and (b)(2)(A)(ii) - Pretreatment requirement

The present language requiring "compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act" is unclear as to whether it includes the toxic pollutant effluent standards of §307(a) in referring generally to requirements under §307, since §307(a) would seem not to apply to discharges into publicly owned treatment works. (§307(b) pretreatment standards should pick up discharges of toxic pollutants into treatment works.) However, to refer to §307 in its entirety in §301 may cause confusion in view of the variant time schedules and hearing procedures set out in §307(a) for toxic pollutants as opposed to substances subject to pretreatment [§307(b)]. The above difficulties can be avoided by amending §§301(b)(1)(A)(ii) and (b)(2)(A)(ii) to read:

> "...compliance with any pretreatment requirements under subsection (b) of section 307 of this Act."

3. §301(b)(1)(C)(ii)

In 301(b)(1)(C)(ii), the words "for intrastate waters" should be deleted. Otherwise, the section will not cover State water quality standards for interstate waters which have not been approved under the FWPCA.

§302

As a practical matter, effluent limitations under section 302 whould have to be established on an area-wide basis, in the same manner as enforcement conferences under the FWPCA. This raises a problem in light of the bifurcated jurisdiction of permits under section 402. In section 302 proceedings, the situation will probably be that most dischargers in the area are under exclusive State jurisdication, with a few of the major dischargers, however, being within the category as to which EPA has reserved the right to federal concurrence under section 402. What will happen if EPA thinks that more stringent controls are needed in the areas, but the State disagrees? Under the present draft, it would appear that the EPA-controlled permits would incorporate the more stringent condition, while the State-controlled permits would not. A similar problem might arise if the area in question involves more than one State, and one of the affected States thinks that more stringent controls are needed, while the other State disagrees. A means for resolving this type of conflict should be written into section 302, so that there is some coordination and uniformity among the affected federal and State jurisdictions whenever section 302 limitations are proposed for a particular area.

§304

1. §304(b)

In several places, there is reference to the "degree of effluent reduction" which EPA is to identify as being achievable by a particular type of technology. 304(b)(1)(A), (B), 304(b)(2)(A), (B), 304(d)(1). This should be changed to "degree of effluent limitation," in order to eliminate any inference that the limitation must be expressed in terms of percentage reduction, rather than in terms of pounds of pollutant per unit of production.

2. §304(c)

Section 304(c) establishes a deadline of 180 days after enactment for issuance of information on practices necessary to implement the national standards of performance under section 306. But the initial section 306 standards need not be promulgated until over 18 months after enactment. It would be preferable to require issuance of information under 304(c) at the same time that the standards to which the information pertains are promulgated. 304(c) should be amended to delete "within one hundred and eighty days" from line 9, and add the following sentence in line 14:

> Such information shall be issued at the same time as the promulgation under section 306 of the standards of performance to which the information relates.

3. §304(f)

Section 304(f)(1), directing EPA to establish guidelines for pretreatment, states that such guidelines "shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works)" of any pollutant which interferes with or passes through or is incompatible with the works. On the other hand, section 307(b)(1) directs EPA to establish national pretreatment standards "for discharges of pollutants into publicly owned treatment works." There is no reason for the pretreatment guidelines under 304(f) to be concerned with direct discharges into the water, or to have a broader scope than the 307(b) national standards. Accordingly, the second sentence of section 304(f)(1) should be amended to read as follows:

> "Guidelines under this subsection shall be established to control and prevent the discharge into publicly owned treatment works of any pollutant which interfers with, passes through, or otherwise is incompatible with such works."

§305

The phrase "navigable waters of such State" in 305(b)(1)(B) should be changed to "navigable waters in such State." Otherwise, the subsection could be construed as requiring a report to Congress on all navigable waters of the State--i.e., every navigable body, regardless of interstate connection. This would be inconsistent with the rest of section 305 and the rest of the statute, which is confined to "navigable waters of the United States" (see the definition in section 502(h)). This could be important, since there are many inland lakes which are navigable waters of the State but, because of lack of interstate connection, are not navigable waters of the United States. Unless Congress wants a report on each of the 10,000 lakes in Minnesota, for example, this change should be made.

§306

1. §306(a) and (b)

In 306(a)(1), lines 18, and 306(b)(1)(C), line 3, the term "limitation" should be substituted for "reduction" in order to reflect the concept that abatement may take place through practices that eliminate the creation of waste, rather than solely through treatment that reduces the amount of waste after it has been created.

2. §306(b)(1)(C)

The word "new" should be inserted before "sources" in line 19, page 93, to avoid any implication that the standard described in §306(a)(1) applies to all point sources catalogued pursuant to §306(b).

3. §306(c)

In 306(c), the procedure for delegating to the States the authority to enforce new source performance standards might be read to derogate from the Administrator's authority under the section 402 permit program to withhold concurrence with a State-issued permit which, to his view, did not comply with a new source performance standard. To eliminate this ambiguity, section 306(c)(2) should be amended to read as follows:

> "Nothing in this subsection shall prohibit the Administrator from enforcing, under section 309 of this Act, any applicable standard of performance under this section, or from withholding his concurrence with a permit proposed to be issued by a State, under section 402(d)(2) of this Act, on the ground of non-compliance with any applicable standard of performance under this section."

§307

1. §307(a)(2)

Section 307(a)(2), line 22, should be amended to delete "adduced at such hearings" and substitute "of record." If the evidence supporting the modification is placed in the public docket and is available for inspection by all, then there is no reason to restrict the Administrator's consideration of modifications in the proposed standards to evidence adduced at the hearing. Under the schedule established by 307(a)(2), there may be as much as 5 months betwen the public hearing and final promulgation. It would be most unfortunate if EPA could receive no evidence during that period. 5 U.S.C. 553, which section 307(a)(2) incorporates, does not limit rule making agencies to the evidence adduced at the hearing. The limitation would also appear to be inconsistent with the Administrator's obligation to consult under 307(a)(7), which requires consultations that would not be performed at a public hearing.

2. §307(a)(5)

The Committee Report (at p. 61), states:

> The Committee has provided the Administrator with authority to differentiate among categories of sources in establishing requirements under this section.
>
> This authority, for example, would give the Administrator the latitude to treat a plant that processes cadmium ore differently than he might treat a plant in which cadmium appears as a trace impurity.

However, the language of 307(a)(5) only gives the Administrator authority to "designate the category or categories of sources to which the effluent standard (or prohibition) shall apply." This could be read to mean that, among the categories to which the standard applies, it must be uniform. Section 307(a)(5) should be amended to add the following sentence:

> "Any such effluent standard (or prohibition) may differentiate among the categories of sources to which it applies."

A similar change in section 307(b)(3) would be appropriate with respect to pretreatment standards.

3. §307(b)(1)

The words "publicly owned" shall be inserted before "treatment works" in line 16, page 97, to properly limit the scope of coverage of the third sentence of §307(b)(1), and to conform to the first sentence of §307(b)(1).

§308

Section 308(c) is confusing, since it states that only trade secrets are entitled to confidentiality, but then refers to the "purposes of section 1905 of title 18." 18 U.S.C. 1905 covers much more than trade secrets--it covers "trade secrets, processes, operations, style or work, or apparatus, or *** the identity, confidential statistical data, amounts or source of any income, profits, losses, or expenditures***.." To be consistent, either all reference to 18 U.S.C. 1905 should be eliminated, or confidentiality should be extended to "trade secrets of such person and all other information entitled to protection under 18 U.S.C. 1905." An alternative, middle ground would be to extend confidentiality to "all information exempt from public disclosure under 5 U.S.C. 552(b)(4)." This would incorporate the exemption in the Freedom of Information Act for trade secrets and confidential or privileged commercial or financial information.

§309

1. §309(a)(2)

Section 309(a)(2), relating to periods of federally assumed enforcement, points up a problem by referring (in line 12, page 101) to the "failure of the State to enforce such permit conditions, or limitations effectively...." Does this refer to §402 permits including §306 or §307 requirements, or just to those permits embodying a §301 or §302 "effluent limitations?" The latter sections appear to be the only ones intended to be covered. If so, §309(a)(2), line 12, page 101, should be amended to cover "failure of the State to enforce such limitations or permit conditions applying such limitations effectively, ***."

It should be recognized that a State can, notwithstanding action by the Administrator under §309(a)(2), continue to operate a permit program approved under §402, including any categories of point sources as to which the requirement for federal concurrence has been waived. In any event, the EPA summary takeover procedure under §309(a)(2) could conflict with that provided in §402(c)(3), requiring a public hearing, at least when a State was operating its own 402 program [which is to include enforcement--see §402(b)(7)]. Indeed, other than with respect to existing "more stringent" State standards incorporated into section 301 [via §301(b)(1)(C)], it is unclear whether §309(a)(2) could ever come into play without a State §402 program operating, since until that time presumably only EPA would be enforcing §§301 or 302 through the §402 permit program.

To avoid conflict with section 402(c)(3) hearing procedures, the following new section (3) should be added to §309(a) as follows:

> "(3) If, prior to action taken by the Administrator under paragraph (2) of this subsection, effluent limitations under sections 301 or 302 of this Act are being applied by a State under a program approved under subsection (b) of section 402 of this Act, then the procedure provided in subsection (c)(3) of that section shall be followed by the Administrator in acting to assume enforcement under paragraph (2) of this subsection."

2. §309(a)(3)

This provision, requiring the Administrator to either issue an order of compliance or sue whenever he finds a violation of §§301 or 302 effluent limitations or §§306, 307, 308, or 402 of the Act makes no mention of the 30 day notice required by §309(a)(1) with respect to §301 or 302 effluent limitations. In order to avoid conflict with §309(a)(1), the present version of §309(a)(3) should be revised as follows:

> "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 301 or 302 of this Act...[etc.] he shall, subject to the requirements of paragraph (1) of this subsection as to a violation of an effluent limitation under sections 301 or 302 of this Act, issue an order requiring such person to comply with such section ...."

3. §309(a)(4)

The Senate Report states (at page 63) that if a violation "...involves section 308, the order will not take effect until the polluter has an opportunity to confer with EPA." To avoid unnecessary confusion, the list of exceptions to the "conferring" requirement presently set forth in the first sentence of subsection (a)(4), lines 11 to 15, should be replaced with a single reference to §308 as the section for which a violation order must be preceded by an opportunity to confer. Section 309(a)(4) would then read as follows:

> "(4) An order issued under this subsection relating to a violation of any requirement of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator or to his delegate concerning the alleged violation."

4. §§309(b), (c), and (d)

As presently drafted these sections made no reference to enforcement of orders issued by the Administrator under the emergency power granted him by section 504(a) of the Act. Nor is there any provision for enforcement of such orders make in section 504. Enforcement sanctions, including criminal and civil penalties, should be available in order to make the Administrator's emergency powers meaningful. Therefore, we suggest adding a reference to section 504(a) orders to the enforcement provisions of section 309 as follows:

> "(b) The Administrator shall commence a civil action for appropriate relief, including a permanent or temporary injunction whenever any person -
>
> "(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section or any order issued under subsection (a) of section 504 of this Act."

A similar reference to section 504(a) should be made in the list of violations in sections 309(c) and (d) providing for criminal and civil penalties [as will be discussed below, these sections should, in any event, be patterned more closely after subsection (b)].

In addition to inclusion of §504(a) orders, §§309(b), (c) and (d) should be made to conform to each other as much as possible to avoid any unintended distinctions being drawn between violations subject to injunctive relief, criminal and civil penalties. Looking first at §309(b), subparagraph (6) refers to violations of §§301, 302, 306 and 307 which have already been listed in subparagraphs (2) and (3) of §309(b). This is unnecessary and confusing, and might be read to nullify the restrictions on enforcement of §301 and 302. Subparagraph (6) should be amended as follows:

> "(6) violates a permit, or condition thereof, under section 402 of this Act."

Section 309(b)(5) exempts no-permit discharge violations from enforcement until July 1, 1973. This is intended to encourage prompt action by EPA in processing permit applications (see Senate Rep. p. 64). However, omitting the exemption from the criminal and civil penalties in §§309(c) and (d) certainly does not reinforce the pressure on EPA to process applications and also will not encourage industry to file early since they can get prosecuted anyway. Therefore, this exemption should be included in §§309(c) and (d).

An additional inconsistency among these provisions appears in §309(d) where the violations subject to penalty are listed in more abbreviated form and some differences can be discerned as to sections 301, 302 (reference to federally-assumed enforcement omitted) and 307 (reference to pretreatment standards omitted).

In sum, section 309(b) should be rewritten to delete the portion of §309(b)(6) referred to above, and §§309(c) and (d) should then be made to conform to subsection (b) unless different treatment is specifically intended.

§311

1. §311(a)(3)

The question of whether this section applies to continuous discharges, or this section, and toxic substances under section 307(a), overlap and conflict. Thus, for example, a heavy fine is establised for any discharge of certain hazardous substances (section 311(b)(2(C)), although under section 307(a) the same substance might be classified as "toxic" and subject to an effluent limitation which permits some continuous discharge.

If the intent is to apply the section only to spills, then the present definition of "discharge" in 311(a)(3) should be changed. The definition could be changed to read as follows:

> "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but shall not include any discharge that is in substantial compliance with an effluent limitation established under sections 301, 302, 306 or 307, or is in substantial compliance with the conditions of a permit issued under section 402 of this Act."

2. §311(b)(2)

Section 311(b)(2) rests on a misconception as to the nature of "removal" of hazardous substances. The section requires EPA to determine whether any listed hazardous substance "is subject to removal under this section." The term "removal" is defined in an extremely broad fashion by 311(a)(9) to include not only removal in the ordinary sense, but also "the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare***." This would include, for example, evacuation of a population, or closing down a public water supply system. Under this definition of removal, every "hazardous substance" would be "subject to removal" under many if not most circumstances. Indeed, even under a more restricted concept of "removal", if the circumstances are right just about any hazardous substance can be removed. Witness, for example, the case of the small lake in Ohio into which a quantity of endrin was dumped; removal was accomplished by draining the lake. Or in the case of some spills, "removal" of just about any substance might be accomplished by diking, if the circumstances are right.

In light of these considerations, 311(b)(2)(B) commits a basic error in assuming that there can be a general determination for each hazardous substance as to whether it is "subject to removal." Removal must depend on the particular circumstances of the spill, as well as on the type of substance involved. Accordingly, 311(b)(2) should be amended to make the penalty which it imposes dependent on the degree to which the substance was removed or removable in the circumstances of the particular spill for which the penalty is imposed.

There is another problem with 311(b)(2) as drafted. It imposes a minimum penalty of $50,000 regardless of the amount discharged. Yet 311(b) requires the President to issue regulations which would determine that certain amounts of hazardous substances are not harmful. It would make no sense to impose a $50,000 fine for a discharge of an amount which EPA regulations said was

was not harmful. In view of this problem and the problem relating to removability, we would suggest amending section 311(b)(2) to read as follows:

> "(B) The Administrator shall, as part of any determination under subparagraph (a) of this paragraph, establish the rate of penalty, not to exceed $5,000 per barrel (or equivalent unit established by regulation by the Administrator) of discharge, to be imposed under subparagraph (C) of this paragraph, for each hazardous substance designated. He shall establish such penalty based on the toxicity, degradability, and disposal characteristics of such substance.
>
> (C) The owner or operator of any vessel, onshore facility or offshore facility from which there is discharged any hazardous substance designated under subparagraph (A) of this paragraph, shall be liable, subject to the defenses to liability provided under subsection (f) of this section, to the United States for the penalty per barrel of such substances discharged established under subparagraph (B) of this paragraph, or $50,000 per discharge, whichever is greater. Such penalty shall be subject to reduction to the degree that the owner or operator can prove to the satisfaction of the Administrator that the hazardous substance discharged was in fact removed and appropriate restoration action taken. In addition, in determining the amount of the fine, the Administrator shall consider the degree to which the discharger removed the hazardous substance and took other steps to reduce the environmental effect of the discharge. No such penalty shall be imposed for any discharge of any amount determined not to be harmful under regulations issued pursuant to paragraph (4) of this subsection."

3. §311(b)(6)

Following the provisions of the present Act, this provision assigns to the Coast Guard responsibility for assessing a civil penalty of up to $10,000 for discharges of oil and hazardous substances. The present Act, however, only covers discharges of oil. Expansion of the section to hazardous substances may make it desirable for EPA to be the agency with authority to impose a fine in certain cases, as, for example, discharges of hazardous substances from various industrial facilities. The Coast Guard, of course, would remain the most qualified agency where there are discharges from vessels or terminals. Section 311(b)(6) should be amended to give the President authority to allocate the authority among EPA and the Coast Guard, as follows:

> "(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or hazardous substance is willfully or negligently discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the appropriate agency of the United States Government as determined by the president of not more than $10,000 for each offense. No penalty

> shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such agency. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such agency. The Secretary of the Treasure shall withhold at the request of such agency the clearance required by section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91), of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such agency."

4. §311(d)

Section 311(d) provides the President with authority to take summary action in the event of a marine disaster involving a substantial threat to the public health or welfare. This section is brought into play if there is an actual or imminent discharge of "large quantities" of oil or hazardous substances from a vessel. The word "significant" should be substituted for the word "large" (line 16) to insure application of the section to hazardous substances which may present a substantial threat to the public health or welfare even in small quantities.

5. §311(p)

Section 311(p), which requires vessels to carry evidence of financial responsibility for liabilities under 311, is made effective by 311(p)(2) one year after the effective date of the Water Quality Improvement Act of 1970. This makes sense with respect to liability for oil spills, which was established by the 1970 Act, but it does not make sense with respect for liability for hazardous substance spills, which would be established by the present legislation. Accordingly, the first sentence of 311(p)(2) should be amended to read as follows:

> The provisions of paragraph (1) of this subsection shall be effective one year after the effective date of the Water Quality Improvement Act of 1970 with respect to liability for discharges of oil, and one year after the effective date of this section with respect to liability for discharges of hazardous substances.

§312

§312(f)(3)-no-discharge zones

The word "navigable" should be inserted before "waters" in line 15 (page 138) to clearly bring this section into line with the scope of §312(h)(4) and the scope of the Act as a whole which is limited to navigable waters of the United States.

§401

1. §401(a)(7)

Section 401 is essentially the same as the present section 21(b). However, the grandfather clause--section 401(a)(7)--has been amended to achieve a result exactly the opposite of what the Senate Committee intended. The Senate Committee report explains that the intent of the amendment was to exempt Refuse Act permits (or equivalent permits under the new Act) from the grace period, where construction of the facility started before April 3, 1970. The Report explains (at p. 69): "Certification will be required for all such permits from the date of enactment on, regardless of time construction of the facility began."

However, as drafted the new section 407(a)(7) does not exempt Refuse Act or equivalent permits from the grace period. Instead, it includes such permits in the grace period, and then exempts them from the requirement that the permit expires on April 3 1973, unless a water quality certification is obtained.

Section 401(a)(7) should be amended to delete the parenthetical phrase following the word "permit" in line 1 (p. 151 of the print), and insert the same parenthetical phrase in line 24 (p. 150 of the print) following the word "permit."

2. §401(d)

Certifications under section 401 are to assure compliance with sections 301 and 302 and "any other applicable water quality requirement in such State." The scope of the catchall phrase is not defined in section 401, and the question arises as to whether certification by the State is to include certification with respect to discharges from point sources within section 306 or 307. Section 401(d) provides that any certification is to set forth the effluent limitations necessary to assure that the applicant for a federal license will comply not only with sections 301 or 302 but also sections 306 or 307 or any more stringent requirement under State law as provided for in section 510 of the Act. Therefore, the intent of the drafters apparently was to allow the States to certify as to section 306 or 307 requirements or any applicable State requirement saved under section 510. This intention would be more clearly expressed if the term "applicable water quality requirement" was defined in a new subsection (f) which would track the present language of subsection (d) as follows:

> "(f) The term 'applicable water quality requirement' as used in this section means any applicable effluent limitations under section 301 or 302 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, or any more stringent water quality requirements under State law as provided in section 510 of this Act."

Present subsection (d) should then be shortened to read as follows:

> "(d) Any certification provided under this section shall set forth any effluent limitations and monitoring requirements necessary to assure that any applicant for any Federal license or permit will comply with any applicable water quality requirement and shall become a condition on any Federal license or permit subject to the provisions of this section."

§402

1. §402(c) and (f)

No provision is made in the present draft for the revocation of the Administrator's waiver of EPA overview under section 402(d). The only way for the Administrator to reassert EPA authority with respect to point sources for which a waiver has been made under section 402(e) or (f) is to act under section 402(c)(3), which requires a public hearing, to withdraw approval from a State's entire 402 program. There may well be some instances involving a particularly serious or important discharge within a waivered category as to which EPA should take an active role, yet there may be no grounds, nor any need, for withdrawal of approval of the State's entire program under §402(c)(3). The intent throughout section 402 appears to be to create a system whereby the great bulk of permits will be issued and enforced by the States, with EPA taking part only as to permits covering discharges which pose particularly serious or difficult problems. Yet EPA might be very reluctant to grant waivers if they could not later be modified or revoked. We believe, therefore, that a provision should be made for selective revocation of section 402(e) or (f) waivers. This could be accomplished by adding a new subsection (g) which would provide:

> "(g) The Administrator may modify or revoke any waiver issued under subsection (e) of this section, or any regulations issued under subsection (f) of this section."

2. §402(l)

Section 402(l) requires that copies of the permit application be made public. Nothing is said as to protection of trade secrets or confidential commercial or financial information. It would seem appropriate to accord the same degree of confidentiality to permit application data as is accorded by section 303(c) to information obtained by inspections and reports.

§509

The comments made supra regarding section 308(c) apply also to section 509(a).

Section 509(b)(1) fails to provide for judicial review where the Administrator concurs (or refuses to concur) in the State issuance of a permit. The second sentence of 509(b)(1) should be amended to read as follows:

> "A petition for review of the Administrator's action in approving or promulgating any effluent limitation under sections 301 or 302 of this Act, or issuing or denying any permit under section 402 of this Act, or concurring or refusing to concur in State issuance of any permit under section 402 of this Act, may be filed by any interested persons only in the United States court of appeals for the appropriate circuit."

§511

1. §§511(a) and (c)

This section provides that the Rivers and Harbors Act of 1899 shall remain in effect, except that any certification pursuant to §401 or license issued pursuant to §402 shall be conclusive as to the effect on water quality of any discharge from any activity subject to section 10 of the 1899 Act. However, no mention is made of section 13 (the Refuse Act) which, of course, is to be supplanted by the permit program created by §402 of the new Act. Other than as to section 10, the 1899 Act is specifically saved by §511(a) [line 7]. This clearly does not square with § 402 and should be corrected by including the Rivers and Harbors Act of 1899 in the list of statutes set forth in §511(c) which are to be displaced by the new legislation (as to regulation of pollutant discharges but not navigation and anchorage). Section 511(c) would then read as follows:

> "(c) Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1899 (30 Stat. 1121; 33 U.S.C. 401 et seq.), the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451 b) shall be regulated pursuant to this Act, and not subject to such Act of 1899, Act of 1910 and Act of 1883 except as to effect on navigation and anchorages."

2. §511(d)(2)

Section 511(d)(2) overlooks the fact that many States, for various reasons, may waive the certification. The effect of 511(d)(2) as drafted would probably be to require compliance with NEPA for Refuse Act or section 402 permits, wherever State certification was waived.

In addition, EPA concurrence in a State-issued permit could be regarded as a significant federal action requiring compliance with NEPA, unless 511 (d) is drafted to cover such action.

Section 511(d)(2) should be amended to read as follows:

> "(2) by the issuance of a permit pursuant to section 13 of the Act of March 10, 1899, or by the Administrator's issuance of, or concurrence in the issuance of, a permit under section 402 of this Act, with respect to any license or permit for the operation of any activity which may result in any discharge into the navigable waters of the United States."

Statement on S. 2770

The bill as passed by the Senate, simply leaves too many questions unanswered to be summarily passed upon by this Committee. That is why, in my view, these additional hearings are necessary. I would like to point out some of the more glaring problems to you today. In addition I am submitting a detailed analysis of S. 2770 which will amplify these problems and also set forth many other problem areas of that bill, as passed. Some of these difficulties reflect merely inadequate drafting; however, many also present substantial questions of policy which I believe require detailed examination by your Committee, and the House as a whole, before final action is taken.

A good place to begin an examination of S. 2770 is in the enforcement section which is section number 309. Surprisingly, this section omits any reference to enforcement of emergency orders to be issued by the Administrator of EPA under section 504 of the Act. These orders would be issued when pollution hazards present an "imminent or substantial endangerment to the health or welfare" in the words of section 504. Such authority for action on the part of EPA is a proper and highly desirable addition to the weapons available to the Agency to take whatever action is necessary to protect the intergrity of our water resources. However, emergency orders under section 504 are not made enforceable by section 309 of the Senate bill. No sanction is provided for a violation of section 504. This presents us with the ridiculous result that orders directed to the gravest pollution hazards may not be enforceable.

A second matter which concerns me relates to the procedure created by section 401 of S. 2770. This section is modeled after a section in the existing statute and will require state certification that federally licensed activities will not violate water quality requirements. According to the Senate Report, a state certification must be obtained before any federal permit can issue under the Refuse Act Permit Program, or its successor created by section 402 of the Senate bill. And, according to the Senate Committee Report, this requirement is to apply regardless of when the discharging facility was constructed.

We agree with the Senate Report that immediate state certification is necessary in order to best achieve the goal of abating water pollution, regardless of when the facility was constructed. However, the Senate bill as actually drafted and passed not only fails to accomplish this result, it actually eliminates the requirement in the present law that all facilities, regardless of when they were constructed, must obtain a state certification by April, 1973.

A third area of concern to me, and another which reveals a need for detailed consideration by this Committee, is that of "Water Quality Related Effluent Limitations" created by section 302 of the Senate Bill. The intent here is to allow effluent limitations to be set on the basis of receiving water requirements rather than to set these limitations based upon the degree to which it is possible to treat a particular discharge. This will allow stricter limitations to be set for particular water bodies where the 1981 best available technology standard will not insure the high degree of water quality which we seek to achieve.

The problem, however, with the present version of section 302 is that it mixes into its area-wide approach a procedure focusing on individual discharges, with inadequate mechanisms for coordination among State and Federal Agencies. In particular, section 302 ignores the possibility that specific waters to which the section 302 limitations will apply may cover more than one state jurisdiction. In addition, some of the discharges within the area may be subject to exclusive state jurisdiction under an approved section 402 permit program, while others may be subject to federal overview. For these reasons, a multiplicity of jurisdictions could well apply to discharges within the area as to which section 302 limitations may be sought. This situation will give rise to at least two problems under the Senate bill.

First, there is no guidance as to who shall call the hearing required to set section 302 limitations and how it shall be run. Second, and perhaps more importantly, what would happen under the present bill if EPA believes a more stringent standard is necessary in a particular area but the state disagrees? Apparently, section 402 permits under exclusive state jurisdiction would incorporate the less restrictive standard while other permits subject to EPA review would apply the more stringent condition. The same sort of conflict could occur between states. These conflicts are inevitable and would obviously undermine the area planning so necessary to make section 302 more more than a dead letter. Yet there is no indication in the Senate bill that these problems have yet been considered.

Lastly, another troublesome issue is posed by the treatment of trade secrets in section 308 of S. 2770. This is the section which gives EPA the power to conduct certain inspections and monitoring operations in order for EPA to effectively set and enforce the effluent limitations to be created under the bill. Once again a basic issue remains unresolved. Businessmen are often understandably reluctant to divulge certain information about their operations and processes for fear of turning over to a competitor hard won competitive advantages which, if they qualify under the law of trade secrets, are entitled to protection.

On the other hand, the Environmental Protection Agency must have reasonable access to pertinent information necessary to accomplish its mission in restoring our environment. Therefore, to encourage industry cooperation we intend to cooperate with industries subject to inspection and monitoring to protect confidential business information from public disclosure. Defining this area, however, presents the difficult task of achieving a fine balance between legitimate protection and the public's right to know, as secured by the federal Freedom of Information Act. Rather than seek this balance, the Senate bill appears to straddle the fence. On one hand, section 308 of the Senate bill protects "trade secrets," and no more. In the next breath, it invokes the "purpose" of section 1905 of Title 18 of the U.S. code--a law that protects a much wider range of information than is comprehended by the term "trade secrets" alone. the Freedom of Information Act provides still another standard of disclosure and includes some commercial or financial information as well as trade secrets.

I do not suggest that this issue admits of an easy answer. In fact it presents a most difficult problem which, together with those which I discussed earlier, can be profitably examined and, I am sure, given much needed illumination by your Committee.

TITLE: Meaning of the term "Navigable Waters"

DATE: February 6, 1973

As you are undoubtedly aware, a key legal question under the Federal Water Pollution Control Act Amendments of 1972 is what waters are included within the term "navigable waters" as that term is defined in the bill. The basic prohibition in §301 of discharges without a permit applies only to discharges into "navigable waters" (§502(12)), and the term appears in numerous other contexts.

The term "navigable waters" was defined to include "navigable waters of the United States" in early versions of both S. 2770, and H. R. 11896, bills to amend the Federal Water Pollution Control Act. However, the Committee of Conference amended section 502(7) in the Federal Water Pollution Control Act Amendments of 1972 to read as follows:

> The term "navigable waters" means the waters of the United States, including the terrritorial seas.

This change was significant. The statement of managers in the Conference Report indicates that the new definition of "navigable waters" is to "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rept. No. 92-1236 at 144.

We have investigated the origin and history of the term "navigable waters of the United States," in order to determine the significance of the deletion of the word "navigable." That phrase, as it was construed in early Supreme Court decisions, depended upon the application of two tests. First, the waters in question were required to be navigable in fact, which meant that they must be capable of being used by vessels in carrying goods in commerce. Second, the phrase "of the United States" meant that the waters had to be capable of being used in interstate commerce. Accordingly, the deletion of the word "navigable" eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce.

It will, of course, be a major task to determine, on a case by case basis, what waters fall within the category "waters of the United States." However, for the purpose of making initial administrative determinations, at least the following waters would appear to be "waters of the United States":

(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate waters:
(4) Interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
(5) Interstate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
(6) Interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

I believe that this board interpretation is well grounded in the language of the statute and in the legislative history, and comports with the expressed intent of Congress to "restore and maintain the chemical, physical, and biological integrity of the Nations's waters."

§ § § § § § § §

TITLE: Meaning of Best Practicable Waste Treatment Technology

DATE: August 27, 1973

In connection with our office's effort to develop a definition of "best practicable waste treatment technology." (BPWTT) you have requested my opinion on certain issues related to this statutory term. Your questions, my answers, and some additional observations, follow.

QUESTION

In defining best practicable waste treatment technology, may expections be made to the definition based on ambient receiving water conditions (i.e., receiving water temperature, location, geology, salinity or dissolved oxygen levels)?

ANSWER

Yes.

DISCUSSION

Section301(b)(2)(B) requires all publicly owned treatment works to achieve compliance, not later than July 1, 1983, "with the requirements set forth in section 201 (g)(2)(A) of the Act."

Section 201(g)(2)(A), in turn, requires that "alternative waste management techniques have been studied and evaluated and the works proposed for grant assistance will provide for the application of the best practicable waste treatment technology over the life of the works consistent with the purposes of this title;".

While there is clear evidence of a Congressional intent that the secondary treatment standard be technology based rather than based on ambient water quality considerations, 1/ no evidence exists of a comparable intent with regard to BPWTT. Indeed, the structure of the Act and the legislative history of sections 301(b)(2)(B) and 201 (g)(2)(A) suggest that the water quality effects of the various alternative treatment technologies evaluated may be considered in determining what is "best practicable."

1/ S. Rep. 92-414 (92nd Cong., 1st Sess.), 43-44.

The Act itself established a significant distinction between the BPWTT standard and those applicable to industrial discharges or municipal plants prior to 1983. Whereas the Administrator is directed to promulgate definitions of "best practicable/best available" technology (for industrial discharges) and "secondary treatment" (for municipal discharges), no corresponding definition of BPWTT is required. 2/ The existence of such a definition would seem to be a necessary precondition for a uniform technology based standard. The absence of any requirement for it is thus some evidence of a Congressional intent that BPWTT be distinguised from other standards, from the standpoint of achieving uniform, technology-based limitations.

Then Administrator Ruchelshaus testified in response to H.R. 11896 that a "best practicable" standard should be required of municipal treatment works "based on water quality standards. 3/ Both the Senate and House Reports reveal a concern that treatment technologies be tailored to the impact of water quality which is consistent with the Administrator's testimony. Two comments in the House Report are particularly instructive.

(1) "The term 'best practicable waste treatment technology' covers a range of possible technologies. There are essentially three categories of alternatives available in selection of wastewater treatment and disposal techniques. These are 1) treatment and discharge to receiving waters, 2) treatment and reuse, and 3) spray-irrigation or the land disposal methods. No single treatment or disposal technique can be considered to be a panacea for all situations...."

(2) "In arriving at the best practicable waste treatment technology, consideration must be given to its full environmental impact on water, land and air, and not simply to the impact of water quality." 4/

The Senate Committee Report similarly indicates that conventional secondary treatment should not be relied upon without consideration of alternative systems which may have greater impact on water quality, i.e., containment of storm water runoff. 5/

2/ Section 304 (d)(2) merely direct the Administrator to publish "information" on alternative waste treatment management techniques and systems available to implement section 201. A definition of BPWTT is, however, not precluded.

3/ Legislative History of the Water Pollution Control Act Amendments of 1972, 843, 1198.

4/ H. Rep. 92-911, (92nd Cong., 2d Sess.) 87-88.

5/ S. Rep. 92-414 (92nd Cong., 1st Sess.) 23-25.

Based on this legislative history and the structural differences in the Act's treatment of BPWTT, it is my opinion that, in developing a definition of BPWTT, the Administrator may take into consideration the effects of alternative treatment technology on the ambient receiving water.

It should be made clear, however, that secondary treatment continues as a minimum requirement of all publicly owned treatment works. Regardless of whether, in some cases, BPWTT consists of something other than refinements on conventional secondary treatment, the discharge must be at least as low as the level defined in EPA's secondary treatment definition.

QUESTION

May the definition of the best practicable waste treatment technology (or exceptions to it) be based upon a formula relating the estimated cost of the treatment works to the conditions of the ambient receiving waters and/or the benefits which will accrue to it?

ANSWER

Yes

DISCUSSION

There is no explicit statutory authorization to consider cost at all in determining the best practicable waste treatment technology. Nevertheless, it seems clear that cost should be considered in making this determination. Some sort of rough correspondence between cost and benefit inheres in the concept of "practicable." The Act itself clearly requires consideration of cost in determining the standards to which industrial point sources must adhere in 1977 and 1983. Thus, section 304(b)(1)(B) requires the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." Section 304(b)(2)(B) does not explicitly mandate a cost benefit balancing; nevertheless, it does require the Administrator to consider the "cost of achieving such effluent reduction." It is hard to credit a Congressional intent to prevent the Administrator from considering cost of achieving best practicable waste treatment technology for municipal plants when the question of cost and its proper consideration played such a significant part in the Congressional consideration of the bill.

Since ambient receiving water conditions may be considered in establishing the definition of BPWTT, it is my opinion that, in relating costs of treatment to benefits derived, the benefits may include, not only those technologically measurable improvements in the polluting character of the effluent discharge, but also the marginal benefits which will accrue to the receiving waters.

QUESTION

May exceptions to the definition of best practicable waste treatment technology be made on the basis of the population served by the size of the treatment works?

DISCUSSION

"Exceptions" to the definition are not contemplated by the Act. Nor is there anything in section 304(b)(2) or section 201 comparable to the provisions in section 304(b)(1)(B) and 304(b)(2)(B) which identify the factors which the Administrator must take into account in determining "best practicable control technology currently available" and "best available control technology economically achievable."

On the other hand, nothing in the Act or the legislative history suggests a congressional intent to exclude considerations of factors similar to those set out in section 304(b) in the context of municipal plant technology.

Senate Report 92-414 indicates that land disposal techniques must be considered and that in doing so the effects on land and plant life must be evaluated. House Report 92-911 contains an even broader discussion of alternatives indicating that "no single treatment or disposal techniques can be considered to be a panacea for all situations. The selection of the best alternative can only be made after careful study. . . ." In defining "best practicable waste treatment technology" for a given case, consideration must be given to new improved treatment techniques which have been developed and are now considered to be ready for full scale operations."

Hence, the omission in the Act of a list of specific considerations cannot be taken as evidence of congressional desire to exclude any particular factors from consideration. The most reasonable conclusion is that those factors listed in section 304(b) which are relevant to municipal plants may be considered as well as other relevant factors of a similar nature not listed there. This may include the size of a treatment facility if evidence indicates that cost or other factors make the same level of effluent reduction not practicable. As in the subcategorization of industrial categories for the effluent guidelines now being issued pursuant to sections 304 and 306, however, it is imperative that there be a sound factual basis supporting any distinction in the definition of best practicable waste treatment technology. The necessity for factual support applies to a proposed distinction on the basis of size of treatment facility or population served.

Finally, I must point out that the document entitled "Information on Alternative Waste Management Techniques and Systems to Achieve Best Practicable Treatment Technology" dated July 23, 1973, does not appear to satisfy the requirements of section 304(d)(2) of the Act.

As indicated in my memorandum to you dated March 13, 1973, section 304(d)(2) does not require a "best practicable treatment" standard for publicly owned treatment works. Such a standard is authorized, though not required, by other sections of the Act and there is no legal objection to issuing such a standard in conjunction with the issuance of information on alternative waste treatment management techniques under section 304(d)(2). What must be emphasized, however, is that section 304(d)(2) does require EPA to issue information on alternative waste treatment management techniques and systems available to implement section 201.

The House Report states:

> "The term 'best practicable waste treatment technology' covers a range of possible technology. There are essentially three categories of alternatives available in selection of waste water treatment and disposal techniques. These are (1) treatment and discharge to receiving waters, (2) treatment and reuse, and (3) spray-irrigation or other land disposal methods. No single treatment of disposal techniques can be considered a panacea for all situations and selection of the best alternative can only be made after careful study.
>
> Particular attention should be given to treatment and disposal techniques which recycle organic matter and nutrients within the ecological cycle.
>
> In defining 'best practicable waste treatment technology' for given case, consideration must be given to new or improved treatment techniques which have been developed and are not considered to be ready for full scale application. These include land disposal, use of pure oxygen in the activated sludge process, physical chemical treatment as a replacement for biological treatment, phosphorous and nitrogen removal, collection line treatment, and activated carbon absorption for removal of organics. Planners must also give considerations, however, to future use of new techniques that are now being developed and plan facilities to adapt to new techniques." H.R. 92-911, 92nd Cong., 2nd Sess. at 87-88
>
> "Section 304(d)(2) requires the Administrator to publish information on alternative waste treatment management techniques and systems available to implement section 301 of this Act. The Committee intends that the Administrator shall emphasize land disposal techniques. . . . It is mandatory that information on such techniques be kept up to date and published as it is available in order that the planning as required in section 208 and the consideration of alternatives as required in section 201 can be based upon the latest developments in land disposal." House Report 92-911, 92nd Cong., 2nd Sess. at p. 108-109.

In order to comply with the requirements of section 304(d)(2) of the Act some minimal degree of discussion of each of the alternatives listed in the House Report and identification and discussion of any additional newly developed technologies is required. The June 19, 1973, draft of the information document contained, in pages 10 through 15, information responsive to the mandate of section 304(d)(2) although in a highly abbreviated form.

In short, the document presently entitled "Information on Alternative Waste Management Techniques and Systems to Achieve Best Practicable Treatment Technology" contains essentially a definition of best practicable treatment technology rather than information on alternative waste management techniques and systems available to achieve it. While there is no legal objection to the issuance of such a definition, and while it may prove helpful in implementation of the grants and permits programs, it is not sufficient to satisfy the requirements of section 304(d).

§ § § § § § §

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(PERMIT PROGRAM SECTION 402)

TITLE: The Statutory Background and Legislative History

DATE:

The permit program regulations, 33 CFR 209.131, 35 Fed. Reg. 6564, derive their authority primarily from section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407. In pertinent part, section 113 makes it illegal to "throw, discharge, or deposit* * *either from out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water* * *provided* * *, That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned into navigable waters, within limits to be defined and under conditions to be described by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

The Supreme Court has held that section 13's prohibition against discharges must be read broadly to protect against pollution of the nation's waterways as well as against obstructions to navigation. *United States* v. *Standard Oil Co.*, 384 U.S. 224; see *United States* v. *Republic Steel Corp.*, 362 U.S. 482. And in *Zabel* v. *Tabb*, 430 F.2d 231-214 (C.A. 5), the Fifth Circuit pointed out that the Committee on Government Operations of the House of Representatives had urged the Secretary of the Army to use the permit-granting power of the Rivers and Harbors Act of 1899 (including, of course, section 13) to protect environmental quality. The court used this point to support its holding that the Secretary of the Army was " entitled, if not required to consider ecological factors" in determining whether to issue a permit to fill in 11 acres of tidelands under section 10 of the Rivers and Harbors Act. 1/

B. The creation of the Environmental Protection Agency

On July 19, 1970, the President sent to Congress Reorganizaion Plan No. 3 of 1970, ______ Stat. _____, creating the Environmental Protection Agency and transferring to it those parts of existing federal agencies which dealt with environmental matters. EPA was given overall responsibility within the federal government for protection of the environment. See the President's Message to Congress of July 9, 1970 (quoted in Environmental Reporter 21:0261, 0263). To the new agency were transferred the Federal Water Quality Administration (from the Department of the Interior), the National Air Pollution

---

1/ Section 10, 33 U.S.C. 403, provides, intra alia, and similarly to section 13, that no wharf, pier, dolphin, boom, etc., may be built in any navigable water and no excavation, fill, or other modification of the course, location, condition, or capacity of any navigable water can be undertaken without the authorization of the Secretary of the Army. See *United States* v. *Republic Steel Corp.*, supra.

Control Administration (from the Department of Health, Education and Welfare), and other responsibilities as to control of pollution by pesticides, radiation, and solid wastes from the Department of Agriculture and the Atomic Energy Commission in addition [to] the Departments of Interior and HEW.

C. The creation of the Refuse Act Permit Program

Shortly after EPA began operation, the President issued Executive Order 11574, creating the Refuse Act Permit Program under the authority of section 13 of the Rivers and Harbors Act (and also under the authority of the Federal Water Pollution Control Act, 33 U.S.C. 1151, the Fish and Wildlife Coordination Act, 160 U.S.C. 661, and the National Environmental Policy Act, 42 U.S.C. 4321).

The Refuse Act Permit Program, as created by the Executive Order, provides a comprehensive and efficient means for abating and controlling pollution of the nation's waterways resulting from discharges into navigable waterways and their tributaries. The program is administered jointly by the Secretary of the Army and the Administrator of EPA.

Section 2 of the Executive Order provides that the Secretary of the Army shall be responsible for "granting, denying, conditioning, revoking, and suspending Refuse Act permits." Subsection 2(A) then provides that the Secretary of the Army "shall accept the findings, determinations, and interpretations which the Administrator [of EPA] shall make respecting applicable water quality standards and compliance with those standards in particular circumstances * * *. A permit shall be denied * * * where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator [of EPA] pertaining to applicable water quality standards and considerations."

Stated briefly, then, the Executive Order provides that in determining whether, and on what terms, to issue a permit under section 13 for any discharge into a navigable water or tributary thereof, the Secretary of the Army shall accept determinations of EPA as to the effects of the proposed discharge on water quality and shall refuse the permit where EPA determines that the proposed discharge would be inconsistent with water quality standards2/ and related water quality considerations.

In particular, 33 CFR 209.131(d)(11) states those situations in which a permit will not be granted:

No [section 13] permit will be issued:

(i) In cases where the applicant [for a permit], pursuant to section 21(b)(1) of the Federal Water Pollution Control Act, as amended, is required to obtain a State or other appropriate certification that the discharge or deposit will not violate applicable water quality standards and such certification was denied;

(ii) For discharges or deposits of harmful quantities of oil, as defined pursuant to section 11 of the Federal Water Pollution Control Act;

2/ "Water quality standards" is a term of art referring to standards for the protection of water quality set by the states and EPA pursuant to section 10 of the Federal Water Pollution Control Act, 33 U.S.C. 1161. See fn. 3, infra.

(iii) If its issuance would be inconsistent with any finding of the Administrator [of EPA] concerning applicable water quality standards and related water quality considerations;

(iv) For materials designated as hazardous substances under regulations to be promulgated by the Administrator of EPA under section 12 of the Federal Water Pollution Control Act, as amended, except with the approval of the Administrator;

(v) If the proposed discharge or deposit will contain a toxic or other substance (other than materials designated as hazardous under regulations to be promulgated by the Administrator of EPA under section 12 of the Federal Water Pollution Control Act) and, if, on the advice of the Regional Representative of EPA, it appears that a permit cannot be conditioned to ensure that the proposed discharge or deposit will not pose any significant risk to health or safety, District Engineers are precluded from issuing permits in such cases. The listing is not intended to identify all of the cases or circumstances in which the denial of a permit may be appropriate.

Thus, the minimum conditions for the granting of a permit are: the determination by both the appropriate state and the Administrator of EPA that the applicable water quality standards would not be violated thereby, and the further determinations by the Administrator that the proposed discharge would not deposit a harmful quantity of oil, would not contain a hazardous material as defined by the Administrator, and would not contain toxic or other substances posing significant risk to health and safety. 3/

3/ The primary conditions required by 33 CFR 209.131(d)(11) to be met are requirements of compliance with sections 10 (concerning water quality standards), 11 (control of pollution by oil) and 12 (control of pollution by hazardous substances), or the Federal Water Pollution Control Act, 33 U.S.C. 1160-1162 (Supp V). The FWPCA is the fundamental federal law for the control of water pollution. Pursuant to the procedure set in section 10(c) of that Act, the states and the Administrator (and his predecessor, the Secretary of the Interior) have established water quality standards for the interstate waters of the nation. Such standards include both water quality criteria, which set levels of quality for such heavy metals such as mercury and chromium, harmful bacteria, poisonous chemicals, dissolved and suspended solids, etc.) and implementation plans, which generally are schedules with the force of law requiring construction of treatment works or other pollution abatement measures (section 10(c)(A) and (B). See 18 CFR 620.)

With respect to section 11, 18 CFR 610.3, promulgated by the Secretary of the Interior as predecessor to the Administrator, defines the deposit of a harmful quantity of oil (prohibited by section 11) as that amount which will "cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." The regulation defining hazardous substances under section 12, FWPCA, are in the process of preparation at EPA.

The minimum conditions that must be met for permit issuance are thus broadly protective of water quality, and are indeed those developed pursuant to the Congressional mandate of the Federal Water Pollution Control Act (see fn 2, supra).

2. The permit program properly regulates deposits into non-navigable tributaries of navigable water.

The plaintiffs assert that section 13 does not authorize the granting of permits for discharges into non-navigable tributaries of navigable waters. However, contrary to plaintiffs' claims, their view of the meaning of section 13 is not at all compelled by its language, would produce strained and highly contorted -- if not irrational -- results, and is wholly inconsistent with the purpose and legislative history of section 13.

A. The statutory language and purpose.

Plaintiffs concede that section 13's provision against depositing refuse prohibits deposits "into navigable water of the United States or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." But plaintiffs rely on the second proviso in section 13 -- which allows the Secretary of the Army in proper cases to permit deposits only "in navigable waters" without any mention of non-navigable tributaries -- to conclude that section 13 does not authorize the Secretary of the Army to grant permits for discharges into tributaries.

When the section is read in context, however, it is clear that plaintiffs' conclusion does not follow. The basic provision of section 13 is the prohibition of discharge or deposit of any refuse into any navigable water or into a "tributary "from which the same shall float or be washed into such navigable water." It is clear from this language that the provision concerning tributaries exists not to protect tributaries as such, but rather because some discharges into tributaries may float or be washed into navigable waters and cause the same harm there as a direct discharge into the navigable water would cause. In effect, the section in terms recognizes that in many cases, a discharge into a non-navigable tributary amounts to a discharge into a navigable water, and prohibits such discharges for that reason only. To put it another way, section 13's purpose is the protection of navigable waters; that section gives attention to discharges into non-navigable tributaries only in those limited cases where the discharge would wash into a navigable water. 4/

In this light it would be senseless to read section 13 to provide that the Secretary may grant permits for allowable discharges into navigable waters but may not grant such permits for similar discharges into non-navigable tributaries of navigable waters. For if the Secretary and the Administrator of EPA

4/ In many situations, a discharge into a non-navigable tributary might not wash into a navigable water (even though the discharge might harm the water quality of the tributary near the source of the discharge). For example, a discharge of organic wastes might become entirely degraded before washing a navigable water, or a discharge of suspended solids -- causing, say, increased turbidity near the point of discharge -- might coagulate and settle out before reaching a navigable water. Such discharges, even though locally harmful, could not be controlled by section 13.

properly determine that a particular discharge into a navigable water may be permitted, there is no reason consistent with the purpose of section 13 why a discharge of similar effect should not be permitted into a non-navigable tributary which would wash into that navigable water. In either case, the same discharge into the navigable water would result - and this is the sole concern of section 13. To repeat, under section 13, deposits into non-navigable tributaries are significant only where such deposits are in effect deposits into navigable waters because they will wash into navigable waters. Therefore, among the kinds of "deposit of *** material in *** navigable waters" which can be permitted under the second proviso of section 13 - where the deposit is permissible under the strict standards of the permit program--are deposits into non-navigable tributaries when those are carried or washed into navigable waters. Although the second proviso of section 13 does not in terms mention tributaries, any other result would be wholly inconsistent with the purpose of section 13. 5/

As the Supreme court said in United States v. Standard Oil Co., supra, 384 U.S. 224, 225-265, in a similar context:

> [W]hatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent and legislative history. We cannot construe §13 of the Rivers and Harbors Act in a vacuum. Nor can we read it as Baron Parke would read a pleading.

The plaintiffs have failed to explain how their reading of section 13 can be squared with that section's purpose. Plaintiffs do suggest that Congress may intentionally have failed to provide permit-granting power to the Secretary of the Army with respect to discharges into non-navigable waters because of Congressional desire "to allow the states to control and regulate their tributary streams***." (Plaintiffs' motion for summary judgment p. 4). But the plaintiffs' reading of section 13 would greatly diminish the power of the states to regulate such non-navigable waters. In the plaintiffs' view, section 13 prohibits discharges into both navigable and non-navigable waters (id. at p. 3); they further assert that the Secretary of the Army is authorized to permit proper discharges only into navigable waters. Therefore, according to their reading of the statute, all discharges into non-navigable waters would be flatly prohibited by federal law, thereby entirely pre-empting any state regulation at all. Contrary to plaintiffs' claims, then, their reading of section 13 would leave the states no leeway

---

5/ It is quite significant that, if the plaintiffs' reading of section 13 prevails, it would bring about a similarly curious result when applied to the first proviso of section 13. That portion of the section states "that nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public works." Again, if the term "navigable waters" as used in this proviso does not include non-navigable tributaries where relevant, then the proviso would be inapplicable to "operations in connection with the improvement of" non-navigable waters which result in discharges washing into navigable waters - a result clearly not intended by Congress.

whatever to "control and to regulate their tributary streams" with respect to the discharges concerned in that section. 6/

It need be added only that plaintiffs' reading of section 13 is inconsistent with the legislative history of that section. The Supreme court noted in United States v. Standard Oil Co., supra, 384 U.S. at 227-228, that the Rivers and Harbors Act of 1899 is a codification of a number of pre-existing statutes, and, as the court held

> the 1899 Act***was no more than an attempt to consolidate these prior Acts into one. It was indeed stated by the sponsor in the Senate to be "in accord with the statutes now in existence, only scattered *** from the beginning of the statutes to the end" (32 Cong. Rec. 2296), and reflecting merely "[v]ery slight changes to remove ambiguities." Id., p. 2297.

Section 13 itself was added to the bill on the floor of the Senate, where it was introduced as part of a general codification prepared by the War Department. The sponsor, Senator Frye, placed upon the record a letter from the War Department, which described the changes as "[containing] no new matter, but simply [revising] and [making] clearer and more definite laws that have already been enacted." 32 Cong. Rec. at 2297.

The source from which section 13 was codified in the 1899 Act was section 6 of the River and Harbor Act of 1890, 26 Stat. 453, which pertinently provided:

> That it shall not be lawful to cast, throw, empty or unload***from or out of any ship***or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation***Provided, that nothing herein

---

6/ Indeed, far greater latitude would be given to the states by a holding that permits may be issued for discharges into non-navigable waters. For pursuant to section 21(b) of the Federal Water Pollution Control Act, 33 U.S.C. 1171(b), a state may prevent any federal permit or license (not only section 13 permits) from being issued where the licensed or permitted activity would violate applicable water quality standards. Thus, under our view of section 13, the concerned state would retain vital power to condition the terms on which permits could be granted, any discharge into a non-navigable tributary (which discharge would be washed into a navigable water) leaving the state no say whatever as to such discharges.

> contained shall extend or be construed to extend to*** prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.

This earlier statute then, prevented discharges into navigable rivers and waters, without in terms mentioning non-navigable tributaries; it further authorized permits by the Secretary of War for deposits "in any place." If section 13 of the Rivers and Harbors Act of 1899 was merely a codification and clarification of earlier law--as indeed the Supreme Court has held--then the reading of section 13 contended for the plaintiffs must be rejected. 7/ For the legislative history shows that Congress did not intend any abrupt and sweeping change of the kind contended for by plaintiffs, which would prohibit any and all discharges into non-navigable tributaries with no possibility of obtaining a permit for a harmless discharge.

3. In any event, a decision on the merits of plaintiffs' claim would be premature.

7/ Another possibility which suggests itself as a purpose of the new language in section 13 is that under earlier law dischargers may have attempted to avoid the prohibition by asserting that their deposits were made into non-navigable waters. To answer such a claim each time it was made would have necessitated the determination of whether the waters in question were navigable--and navigability is of course a Constitutional concept. Thus, a Constitutional issue would have to have been determined each time the claim was made that deposits were being made in non-navigable waters. This obviously unacceptable state of affairs would have been relieved by adding to the law--as section 13 did--an explicit prohibition that deposits in non-navigable tributaries which washed into navigable waters were included under the Act. This new provision was Constitutionally valid because it protected navigable waters, and effective because it would have brought within its ambit all or nearly all deposits being made into waters whose navigability was in question (the navigability of such waters, of course, generally becomes beyond dispute at some point downstream of the point in question). Of course, if such was a purpose of section 134, it is inconsistent with the reading given that section by the plaintiffs.

It is noteworthy that the reading of section 13 asserted by plaintiffs would also create a distinction between the effect of the section on navigable waters (where permits would be allowed) as opposed to non-navigable tributaries (where they would not). This reading would necessitate a Constitutional determination each time it was claimed that the permit provision did or did not apply to a particular discharge. It is most difficult to believe that Congress could have intended the enormous administrative difficulty and the great amount of Constitutional litigation that would be engendered by this result.

We have shown that there is no warrant to plaintiffs' contention that section 13 does not authorize the Secretary of the Army, in proper cases, to grant permits for discharge of refuse into non-navigable tributaries of navigable waters, and we believe, accordingly, that plaintiffs' complaint should presently be dismissed. However, should the Court not be disposed so to hold at this point as a matter of law, we now show that it would be inappropriate for the Court presently to decide the merits of the plaintiffs' claim.

The plaintiffs assert that they will be harmed by the granting of permits for discharges into non-navigable tributaries because such permit issuances "will result in a cloak of legality being placed upon serious pollution of the Grand River and other waterways of the United States***." (Complaint, p. 3) In other words, the injury claimed by plaintiffs is that the permit program will not be used as a measure to curb and to abate pollution, but rather will be used by the Secretary of the Army and the Environmental Protection Agency as a method of permitting "serious pollution" to take place. We submit that it is premature for the plaintiffs to claim that the permit program wil be so administered. At the very least, this Court should await concrete facts, arising from the grant or denial of particular permits, for a determination of what the results of the program will be, rather than accepting the plaintiffs' unsupported claims on this score. For if, as it is most reasonable presently to assume, the adminstration of the permit program leads to abatement and control of water pollution rather than to the licensing of "serious pollution", then the plaintiffs will not have been injured in the way they presently assert, and without such injury to their interests will not be in a position to challenge the legality of the program.

We note preliminarily that, as we have discussed extensively at pages 3-7, the permit program regulations, at a minimum, condition the grant of a permit on compliance with the basic provisions of the Federal Water Pollution Control Act as to water quality standards and control of pollution by oil and hazardous materials. Therefore it can hardly be assumed that the administration of the program will lead to the placing of a "cloak of legality" on "serious pollution." Moreover, as evidence by its creation by Executive Order, the permit program is a major federal effort to control pollution on the nation's waterways.

The Supreme court has held that in cases like the present, where "matters of serious public concern" are involved, with "delicate problems***[whose] solution is bound to have far-reaching import," then adjudication "should rest on an adequate and full-bodied record." Public Affairs Press v. Rickover, 369 U.S. 111, 112-113. The Court in Rickover also cited its decision in Eccles v. Peoples Bank, 333 U.S. 426-431, where it said, "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." And see Public Service Commission v. Wyckoff, 344 U.S. 237,

241. 8/ And the Court of Appeals for the District of Columbia Circuit has also held that where there are public issues of "importance and complexity," they "should not be decided on speculative facts as an abstract question." Industrial Union Department v. Barber-Coleman Company, 348 F. 2d 787, 789-790 (C.A.D.C.) (citing, inter alia, Public Affairs Press v. Rickover, supra). to the same effect is Lampkin v. Connor, 360 F. 2d 505, 509-510 (C.A.D.C.)

Beyond question the instant case presents issues of great current importance; and, moreover, the best can be said for the plaintiffs' assertion that serious pollution will be permitted under the program is that this claim is the sheerest speculation. Therefore, a declaratory judgment is wholly inappropriate at the present time, and will remain so at least until plaintiffs can present factual records seeking to support their assertions. 9/ We stress at this point that, under the permit program regulations, public notice of all applications must be given, and any interested party may comment upon any application. Such comments "will be retained and will be considered in determining whether the permit applied for should be issued." 33 CFR 209.131(j)(2). In addition, public hearings may be held in connection with permit applications. 33 CFR 209.131(k). This regulation provides that, in determining whether to hold hearings with respect to particular permit applications, "consideration will be given to the degree of interest by the public in the permit application, requests by the applicant or responsible Federal, State or local authorities, including members of Congress, that a hearing be held, and the likelihood that information will be presented at the hearing that will be of assistance in determining whether the permit applied for shall be issued." Id. at subsec. (k)(1). Where hearings are held, transcripts become a part of the permit application record. Id. at subsec. (k)(3)(iii). Therefore, not only are the plaintiffs' present allegations speculative and their cause hypothetical, but they are also in the position--as are all other interested persons--to present evi-

---

8/ Professor Wright has summarized the Supreme Court's rulings on this subject:

> The Supreme Court has indicated a very marked reluctance to have important issues of public law decided by declaratory judgments. It has said that declaratory judgment procedure should not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal, and warned against grant of a declaratory judgment involving an important question of public law on the basis of a sparse and inadequate record.

Wright, Federal Courts (2d ed. 1970) §100 at p. 449 [Footnotes omitted].

9/ Because plaintiffs cannot show more than the most speculative claim of harm, the impact of the permit program regulations is not sufficiently direct and immediate as to render the question presently "ripe" for judicial review of the regulations. Compare Toilet Goods Assn. v. Gardner, 387 U.S. 158, 163-166, with Abbott Laboratories v. Gardner, 387, U.S. 136, 152-156.

dence and their views and have those views considered and made a part of the record in particular permit application proceedings. Only after such proceedings have taken place and a record has been made will it be possible to discern whether the plaintiffs can add substance to their claims.

It need be added only that the plaintiffs' Constitutional assertion that the permit program will harm the right to a clean and healthful environment which they assert exists under the Fifth and Ninth Amendments (Complaint, p. 5) is, if anything, even less appropriate for present judicial determination. Not only is the factual situation asserted to support this claim equally unclear, but there is at least very substantial doubt that courts may delimit such rights under these amendments. See, e. g., Ferguson v. Skrupa 372 U.S. 726, 729-732.

The permit program regulations validly provide that no environmental impact statement under section 102(2)(C) of the National Environmental Policy Act need be prepared where a permit application raises questions of water quality only.

In their second claim for relief (Complaint, p. 4-5), the plaintiffs assert the invalidity of 33 CFR 209. 131(1)(2), which provides that the Secretary of the Army will not file an environmental impact statement, as described in section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), in connection with permit applications that concern water quality matters only. Plaintiffs' claim is that the language of section 102(2)(C) of the NEPA flatly requires all federal agencies to file statements as to the impact of federal activities which would significantly affect the environment. As we show herein, however, section 102(2)(C) was not addressed to these federal agencies which regulate the environment, but rather was intended to force those federal agencies which had not previously considered environmental matters to consider such questions in administering their programs. Therefore, environmental impact statements are not required when an agency whose primary function is to regulate the environment engages in such regulatory activity. And since the permit program requires that EPA make decisions as to matters of water quality in determining whether and on what terms to issue section 13 permits, section 102(2)(C) of the NEPA does not require the filing of an environmental impact statement when an application for a section 13 permit raising only issues of water quality is acted upon. 10/

10/ 33 CFR 209. 131(1)(2) states that environmental impact statements are not required "where water quality considerations alone are involved* * *because these matters are specifically addressed under subsections 21(b) and (c), the Federal Water Pollution Control Act, as amended [33 U.S.C. 1171 (b) and (c)]." This reasoning may have been called into question by the decision of the Court of Appeals for the District of Columbia Circuit in Calvert Cliffs Coordinationg Committee v. Atomic Energy Commission, F. 2d. (C.A.D.C. Nos. 24839, 24871, July 23, 1971). However, we show herein that the provision of 33 CFR 209. 131 not requiring environmental impact statements where water quality only is concerned is supported by the purpose and explicity legislative history of the NEPA itself, even if not by section 21(b) of the FWPCA. And, as we discuss more fully
[Fn. cont'd]

The fundamental purpose of the NEPA was to recognize that protection of the environment is a national policy to be studied and considered by all federal agencies in administering their programs. The District of Columbia Circuit, in Calvert Cliffs Coordinating Committee v. Atomic Energy Commission F. 2d (C.A.D.C. Nos. 24839 and 24871, July 23, 1971), said, "Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates" (slip opinion, p. 5, emphasis in original). The court noted that the consideration of environmental issues along with the other matters in the agencies' control "must involve a balancing process" to be carried out by such agencies (id. at 7).

The court then pointed out that the requirement in section 102(2)(C) of the NEPA that agencies prepare an environmental impact statement to accompany actions affecting the environment exists "[t]o ensure that the balancing analysis is carried out and given full effect***" (id. at p. 8). Section 102 (2)(C) also requires that before making such statements, the agencies "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."

The balancing process described by the court of appeals, and the environmental impact provision in aid of that process (with its requirement of consultation with and comments by agencies expert in the environment), are clearly intended for use by those federal agencies with other substantive programs which must now take environmental factors into account for the first time. These provisions and their purpose do not rationally apply to agencies whose sole task is regulation of the environment: such regulatory agencies need perform no balancing since they have no other substantive programs to balance against; moreover, section 102(2)(C) could hardly have been intended to apply to agencies expert in environmental matters, since it would require such agencies to consult with themselves and obtain their own comments before taking action.

The legislative history of the NEPA fully confirms that section 102(2)(C) was not intended to require agencies with regulatory jurisdiction over

---

10/ [Cont.]
below, the court in Calvert Cliffs appeared to recognize that the NEPA was intended to require federal agencies which had previously refused or been unable to do so, to consider environmental matters in administering their programs (e.g., slip opinion at pp. 5, 7, 8); specifically, the court held that under the NEPA the Atomic Energy Commission, in considering whether to license the construction of a nuclear power plant, may not limit its inquiry as to water quality matters to state certifications of compliance with water quality standards, but must independently balance such considerations against benefits to be gained from building the plant. The Calvert Cliffs decision thus concerns only the effect of the NEPA on an agency--the AEC--which had previously not taken environmental matters into account in its activities. The court did not discuss the relationship of the NEPA to federal activities exclusively concerned with environmental regulation.

environmental matters to file impact statements upon taking such regulatory action. In recommending to the Senate that it adopt the Conference Report (H.R. Rep. 91-765, 91st Cong., 1st Sess.), Senator Jackson, the sponsor of the NEPA, presented a document called "Major Changes in S. 1075 as passed by the Senate," which detailed the changes made by the conference version from the original bill as it had passed the Senate (115 Cong. Rec. 40417). The statement included the following concerning section 102(2)(C):

> Many existing agencies such as the Nation Park Service, the Federal Water Pollution Control Agency [a predecessor of EPA; see p. 2, supra] and the National Air Pollution Control Administation [another predecessor of EPA] already have important responsibilities in the area of environmental control. The provisions of Section 102 (as well as 103) are not designed to result in any change in the manner in which they carry out their environmental protection authority. This provision is, however, clearly designed to assure consideration of environmental matters by all agencies in their planning and decision making--especially those agencies who now have little or no legislative authority to take environmental considerations into account.

(115 Cong. Rec. 40418, emphasis added). This was unequivocally stressed by Senator Muskie shortly afterward. After discussing and quoting the language from the "major changes" document quoted above, Senator Muskie said:

> It is clear then, and this is the clear understanding of the Senator from Washington [Senator Jackson] and his colleagues, and of those of us who serve on the Public Works Committee, that the agencies having authority in the environment field will continue to operate under their legislative mandates as previously established, and that those legislative mandates are not changed in any way by sections 102-5.

(115 Cong. Rec. 40423). The inapplicability of section 102 to agencies which regulate the environment was further stressed by Senator Muskie's repsonse to a question from Senator Boggs:

> Mr. Boggs. Am I correct that the thrust of the directives contained in S. 1075 deals with what we might call the environmental impact agencies rather than the environmental enhancement agencies, such as the Federal Water [Quality] Administration and the National Air Pollution Control Administration?
>
> Mr. Muskie. Yes. Sections 102 and 103, and I think section 105, contain language designed by the Senate Committee on Interior and Insular Affairs to apply strong

> pressures on those agencies that have an impact on the environment--the Bureau of Public Roads, for example, the Atomic Energy Commission, and others. This strong language in that section is intended to bring pressure on those agencies to become environment conscious, to bring pressure upon them to respond to the needs of environmental quality***.
>
> With regard to the environmental agencies such as the Federal Water [Quality] Administration and the Air Quality Administration, it is clearly understood that those agencies will operate on the basis of the legislative charter that has been created and is not modified in any way by S.1075.

(115 Cong. Rec. 40425).

these statement by the two principal supporters of the NEPA could hardly make it clearer, first, that the Act was intended to make those federal agencies who had not earlier done so considerate of environmental problems in conducting their programs, and, second, that section 102 of the Act was directed by Congress solely at those agencies and was not intended to apply to agencies which regulate the environment.

As we have discussed, the permit program is a regulatory device by which discharges into navigable streams and their tributaries may be controlled to benefit water quality. Furthermore, as we have also noted, permit decisions in matters of water quality, are made by EPA, which is not the major federal agency with responsibility for regulating the environment.

In such cases, as we have indicated, Congress did not intend such a regulatory agency to be subject to section 102. Moreover, in such cases there is no need to apply the balancing test which the court in Calvert Cliffs stated was the purpose of section 102; and thus there is little purpose to preparing an environmental impact statement. Indeed , as we have noted above, compliance with section 102 would require EPA to submit the statement preliminarily to itself for comment--hardly a result that Congress could have intended.

We stress at this point that the permit program regulations do not require an environmental impact statement only where water quality issues are all that is involved. The regulations explicitly state that where additional environmental effects may be felt, an environmental impact statement must be prepared.[11]

---

[11] In particular, 33 CFR 209.131(b)(2) provides:

> Section 102(2)(C) statements will not be required in permit cases where it is likely that the proposed discharge will not have any significant impact on the human environment. Moreover, the Council on Environmental Quality has advised that such statements will not be required where the only impact of proposed discharge or deposit will be on

Thus, only where the program operates as essentially a water quality regulatory program administered by the Environmental Protection Agency does the permit program dispense with the requirement of an environmental impact statement. And this is precisely the sort of regulatory activity to which, as we have seen, congress did not intend section 102 of NEPA to apply.

We note finally that the plaintiffs argue that environmental impact statements are necessary in order to inform the public as to the effect of the steps taken in granting and denying permits (motion for summary judgment, p. 7). The plaintiffs there assert that the provisions for public hearings on permit applications (33 CFR 209.131(k)) will not be useful unless environmental impact statement are filed. This assertion is not well taken. In the first place, as we have noted above, the regulations provide for public notice to all permit applications. Such notices must include the name and address of the applicant, the waterway involved (with a sketch of the location of the proposed discharge), the character and frequency of the discharge and "any other information (such as the views of the State on the permit application) which may assist interested parties in evaluating the likely impact of the proposed discharge or deposit, if any." 33 CFR 209.131(j)(1). Therefore, there will be more complete public information on the discharge proposed by each permit application. As to the hearings themselves, section 209.131(k)(3) details the public information to be made available before the hearings, including (in addition to the notice described above) "[a]s appropriate, supplementary informational matter, fact sheets, or more detailed news releases* * *." Section 209.131(k)(4) provides in part, "The hearings will be conducted in a manner that permits open and full discussion of any issues involved."

11/ [Cont.]

water quality and related water quality considerations because these matters are specifically addressed under subsections 21(b) and (c), the Federal Water Pollution Control Act, as amended. However, such statements shall be required in connection with proposed discharges or deposits which may have a significant environmental impact unrelated to water quality. In cases in which a section 102(2)(C) statement may be required the report of the District Engineer accompanying any case referred to higher authority (see paragraphs (d)(10) and (i)(7) of this section) will contain a separate section addressing the environmental impact of the proposed discharge or deposit, if any, and if issuance of a permit is recommended, a draft section 102(2)(C) statement should be attached. In all other cases in which a section 102(2)(C) statement is required the District Engineer shall draft, consult with, and obtain the comments of any Federal, State, and local agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. In cases where the preparation of a 102(2)(C) statement is necessary, the District Engineer may require the applicant to furnish such information as he may consider necessary to prepare the required statement.

Of course, after a decision has been made, the entire administrative record of any permit applications will be available for public inspection and judicial review. There is no chance, therefore, that the public will not be sufficiently informed at all phases of the permit process under the existing regulations.

§ § § § § § §

TITLE: Permit Program Under Section 402

DATE: May 25, 1973

Mr. Thomas B. Arnold
Epstein, Salloway & Kaplan
Attorneys At Law
131 State Street
Boston, Massachusetts 02109

Dear Mr. Arnold:

This is in response to your letter of April 20, in which you asked four questions concerning the permit program under section 402 of the Federal Water Pollution Control Act. Your questions, and our responses follow.

QUESTION:

Is a variance or postponement procedure set forth in the Water Pollution Control Act Amendments of 1972? What section of the Act does EPA rely upon as authority for section 124.72(b) of its guidelines?

ANSWER:

Congress did not provide a specific variance procedure in the Federal Water Pollution Control Act. However, section 402(b)(1)(C) requires the State to have authority to issue permits which "can be terminated or modified for cause including, but not limited to, the following:

> (i) violation of any condition of the permit;
>
> (ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
>
> (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge."

As the phrase, "including, but not limited to," makes clear, this list is not inclusive. Any number of other factors might be considered "cause" for the modification of a permit. In our view, included among such factors would be "an Act of God, strike, flood materials shortage, or other event which the permittee has little or no control," as set forth in §124.72(b) of our guidelines.

QUESTION:

Will a decision by a state Director to revise or modify a schedule of compliance pursuant to section 124.72(b) and the proposed Massachusetts law defer the entire schedule of compliance, so as to postpone the deadline for the application of best practicable control technology beyond July 1, 1977?

ANSWER:

Section 301(b)(1)(A) of the Federal Water Pollution Control Act requires the achievement of effluent limitations by July 1, 1977, which require the application of the best practicable control technology currently available. In light of this clear statutory requirement, we do not believe that EPA could approve any revision in a schedule of compliance which extended the date of achievement of best practicable control technology beyond July 1, 1977.

QUESTION:

Does the Act or section 124.72(b) permit a state to revise or modify a schedule of compliance without public notice or the opportunity for a public hearing?

ANSWER:

Yes, in the limited circumstances set forth in §124.72(B). Section 402(b)(3) of the Act requires that a State permit program include authority "to insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application." However, section 402(b)(1)(C), which sets forth requirements concerning termination or modification of permits, does not require opportunity for a public hearing before such termination or modification. In our view, then, nothing in the Act would require public hearings in connection with modifications of permits by State agencies.

In this regard, EPA's guidelines are more stringent than the statute. §124.72 (b) of the Guidelines limits the situations under which a permit may be modified without a public hearing to those where events largely beyond the control of the permittee require a change in the compliance schedule. The Environmental Protection Agency will carefully review each such modification to ensure that this authority is not misapplied.

§ § § § § § §

POLICY GUIDANCE

TITLE: Application of the Fish and Wildlife Coordination Act to the Issuance of Permits

DATE: November 17, 1972

QUESTION:

Is the Administrator required by the Fish and Wildlife Coordination Act (16 U.S.C. §661 *et seq.*) to consult with the Secretary of the Interior and the Secretary of Commerce prior to issuing a permit under Section 402 of the Federal Water Pollution Control Act, as amended?

ANSWER:

No.

DISCUSSION:

The Fish and Wildlife Coordination Act (16 U.S.C. §661 *et seq.*) requires that "whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency shall first consult with the . . . Department of the Interior. . . ."1/ It is clear that the intent of this section is to require such consultation only by federal agencies with responsibility over water resource projects in which actual dredging, fillings, stream channelization, or other direct modification of water course is carried out. This is borne out by the language of 16 U.S.C. §662, quoted in part above, which also requires consultation with "the head of the agency exercising administration over the wildlife resources of the particular state wherein the impoundment, diversion, or other control facility is to be constructed. . . ." Such consultation is for the purpose of preventing loss and damage to wildlife resources "in connection with such water-resource development."

1/ 16 U.S.C. §662(a). Certain of the responsibilities of the Secretary of the Interior under this section are shared by the Secretary of Commerce pursuant to Reorganization Plan No. 4 of 1970.

The plain language of the statute applies only to "water-resource development," and not to discharge permits under the Refuse Act of 1899, or under §402 of the Federal Water Pollution Control Act. The only cases construing these provisions of the Fish and Wildlife Coordination Act have involved actual modification of water courses through dredging and filling or construction of dams. 2/

As you know, however, the Department of the Interior insisted upon a role in the administration of the original Refuse Act Permit Program. As a result, Executive Order 11574, December 23, 1970, 35 FR 19627, requires consultation with the Secretary of the Interior and the Secretary of Commerce "regarding effects on fish and wildlife which are not reflected in water quality considerations, where the discharge for which a permit is sought impounds, diverts, deepens the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made." The preamble to the Executive Order cites the Fish and Wildlife Coordination Act as among the authorities for its issuance.

This requirement would apply in only a very few cases. It is difficult to imagine a discharge which would meet the requirements set forth in the Executive Order for consultation with Interior, and which would not require a permit for dredging and filling under section 10 of the Rivers and Harbors Act of 1899, thereby invoking the Fish and Wildlife Coordination Act by its own terms. The regulations under which the Corps of Engineers formerly operated the permit program, however, went beyond the requirements of the Executive Order. They require consultation with NOAA and Interior with respect to all permits, whether or not meeting the requirements of the Executive Order. 3/ Furthermore, regional representatives of NOAA or Interior could by objecting block issuance of any permit at the regional level, and force the matter to headquarters for resolution. 4/

Apparently believing that these coordination requirements were statutory and not discretionary, the drafters of both S. 2770 and H.R. 11896 included provisions limiting the consultation requirements of the Fish and Wildlife coordination Act to certain regulations and guidelines. 5/ However, an amendment deleting that section was adopted on the floor of the House of Representatives. 6/ Congressman Wright, in introducing the measure, de-

2/ E.g., Udall v. FPC, 87 S. Ct. 1712, 387 U.S. 428 (1967); Zabel v. Tabb, 430 F 2d 199 (5th Cir. 1970); State of California v. FPC, 345 F. 2d 919 (9th Cir. 1965); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970); Delaware v. Pennsylvania New York Central Trans. Co., 323 F. Supp. 487 (D. Del. 1971).

3/ 33 CFR §209.131(i)(3))(1972).

4/ 33 CFR § 209.131 (i)(7).

5/ §511(b), S. 2770, H.R. 11896 (1971).

6/ Cong. Rec., March 29, 1972 at H2735.

scribed it as a "corrective amendment," which "would make the Fish and Wildlife Coordination Act applicable in every respect that it applies by its own terms to all sections of the bill."[7] (Emphasis supplied).

Although this statement on the floor is consistent with the view that the Fish and Wildlife Coordination Act would not apply to §402 permits, Mr. Dingell, Mr. Reuss, and the other supporters of the so-called "clean-water package" of amendments may not accept this view. Mr. Dingell rose in support of the Wright amendment, stating that "this is one of the amendments my colleagues and I were going to offer although in slightly different form."[8] However, the "clean water" amendments would have made the Fish and Wildlife Coordination Act specifically applicable to discharge permits as well as to dredge and fill permits.[9]

As I see it, then, the decision whether or not to provide for consultation with the Secretary of the Interior such as is provided in E.O. 11574, is a policy decision. Such consultation is not required under the Fish and Wildlife Coordination Act. On the other hand, a provision such as that in the Executive Order could provide an effective palliative to the Department of the Interior and concerned congressmen, without having any substantial effect upon the administration of the permit program itself.

---

[7] Id. The Fish and Wildlife Coordination Act could apply by its own terms to permits for disposal of dredged or fill material under §404, FWPCA.

[8] Id.

[9] See Cong. Rec. March 28, 1972, at H2646.

§ § § § § § §

TITLE: Changes in Effluent Limitations or Water Quality Standards - Do They Constitute a Change in Permitted Discharge

DATE: September 7, 1973

You have requested my opinion as to whether a change in either effluent limitations or water quality standards subsequent to the issuance of a permit would constitute a change warranting reduction or elimination of the permitted discharge.

The answer is no.

Section 402(b)(1)(C) of the FWPCA, as amended, authorizes by indirection the termination or modification of permits "for cause" including "(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge."

Section 402(k), on the other hand, provides, in pertinent part, that "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 (federal enforcement) and 505 (citizen suit), with sections 301, 302, 306, 307 and 403, except for any standard imposed under section 307 for a toxic pollutant injurious to human health."

If section 402(b)(1)(C) were construed as broadly as your question suggests, it would upset the security which the permit device is designed to offer the discharger in return for a commitment to make expenditures on pollution control and would thereby nullify the clear purpose of section 402(k).

Accordingly, it is my opinion that the reference in section 402(b)(1)(C) to change in conditions does not extend to include a change in the applicable effluent limitations or water quality standards.

§ § § § § § §

TITLE: Increases in Production and NPDES Permits

DATE: September 25, 1973

You have asked the following questions regarding increases in production and associated increases in the discharge of pollutants during the term of a permit:

1. May a discharger receive large loadings[1] due to increased production?

2. May increases in production be considered as new sources and therefore subject to standards of performance for new sources promulgated under section 306?

ANSWERS AND DISCUSSION

1. A permit, when issued, may provide for increases in the amount of permissible discharge corresponding with projected increases in production.[2]

---

[1] We assume that the term "loading refers to the quantity of any pollutant which is specified in an NPDES permit as legally dischargeable.

[2] The NPDES Regulations (40 CFR Part 125) contemplate maximum limits on discharge which will accommodate increases resulting from "facility expansions, production increases, or process modifications." (40 CFR Section 125.22(a)(1)). So long as such increases are within the limits set out in the permit, the discharges need only notify the Regional Administrator; a separate application is not required.

There are two qualifications to the general rule as just set forth. First, a permit may not allow increases in the discharge of any pollutant due to production increases if applicable state water quality standards would thereby be violated.[3] Second, a permit issued for an existing facility may not authorize in advance discharges which are expected to result from the construction of a "new source" in physical proximity to the existing plant which is the subject of the permit application.

The term "new source" is sufficiently broadly defined in section 306(a)(2) of the Act to allow the Agency substantial power to consider much physical expansion of existing plants as new sources. In view of the somewhat unclear distinctions in the legislative history of this section between modifications of existing facilities and construction of new ones, however, I believe it may be wiser to avoid abstract formulations of precisely what kind and degree of modification will constitute a "new source" and to defer the question until the facts of a particular case call for an answer.

In short, a permit may provide for increases in production not attributable to the construction of a new source so long as water quality standards are not violated. If it can be demonstrated that the application of best practicable technology currently available will not be sufficient to insure compliance with state water quality standards in the event of an increase in discharge, then the discharge increase may be permitted on the condition that the incremental discharge receive additional treatment in order to reduce the concentration of pollutants below that resulting from best practicable technology.

QUESTION:

May increases in production be considered as new sources and therefore subject to standards of performance for new sources promulgated under section 306?

ANSWER:

Increases in production are not per se new sources, for purposes of the Act. At the least, there must be construction of a "building, structure, facility or installation" from which pollution is or may be discharged, which construction is commenced after the publication of proposed regulations prescribing standards of performance for the applicable industrial category. (Section 306(a)(2) and (3)). If the production increase and associated increase in pollutants discharged is due to the construction of a new source, then of course the new source standards apply. If it is not, they do not. As was indicated in the answer to the foregoing question, the determination of what does and what does not constitute a new source must be made, for the moment, on a case by case basis.

---

[3] Section 402(a)(2), FWPCA Amendments of 1972, 40 CFR Section 125.21 (a) and (b).

I should point out that the assumption contained in your memorandum that new source standards will be very stringent is not necessarily correct. The new source standards for many of the categories in which regulations are now appearing in proposed form are considerably less stringent than the effluent limitations proposed for best available control technology economically achievable (the 1983 level).

§ § § § § § §

STATE PERMIT PROGRAMS

TITLE: Permit Program

DATE: December 27, 1972

This memorandum will set forth several points of policy guidance to be followed with respect to EPA efforts under the Permit Program during the next several months.

Preparation and Issuance of Permits by States Having Interim Authorization

Each of the States which received interim authorization last week agreed to work toward issuance of permits on the following schedule: (a) Dischargers where necessary background work has been completed to proceed with development of a proposed permit will be selected immediately and notice for public hearing will be formally issued by mid-January; (b) public hearings for such permits will be held by mid or latter February; and (c) permits will be issued in such cases prior to March 18. This schedule must be achieved to assure completion of permit issuance in an initial group of cases in each State before expiration of the interim authorization on March 18. The top priority of EPA permit staff should be to work with the States which have received interim authorization to carry out all necessary work with respect to this schedule.

Note that State agencies acting under the interim authorization are not technically subject to procedural and other requirements set forth in the EPA guidelines which will apply after final approval of State programs. As a condition to EPA concurrence on individual permits, however, States must at least hold one public hearing (which may cover a number of permits) at the start of its program and must give at least 30 days' public notice in advance of such hearing. EPA will make a full review of each proposed permit to assure that we are satisfied with its abatement, monitoring and other requirements.

We anticipate that each State will process at least six proposed permits and hopefully closer to two dozen proposed permits as the initial group. As manpower allows, additional proposed permits should be undertaken. In cases where public notice and permit issuance cannot be completed prior to March 18, the State public notice and public hearing should be co-sponsored by EPA so that the permits can if necessary be issued by EPA after expiration of the interim authorization.

Preparation and Issuance of Permits by EPA in Other States

Each Regional office should proceed toward issuance of permits by EPA in States which have not received authority to issue permits under section 402. This work should be conducted with complete consultation and maximum cooperation with the appropriate State personnel. Dischargers for which permits are proposed should be selected to the extent possible on the basis of joint agreement with the States concerning the priority and anticipated abatement requirements for such dischargers. Public notice and public hearings should where practicable be jointly sponsored by EPA and the States, and EPA issuance of permits under section 402 should be matched by State issuance of permits imposing comparable requirements.

Each Region should work toward issuance of public notice for hearings on its initial group of permits not later than January 30. Please report to me by January 20 on your plans for this part of the program.

Scale of Permit Program Activities

During the next 9 months the Permit Program will be in its initial start-up phase and necessarily will be operated on a limited basis. Principal emphasis should be placed on the development of correct procedures for preparation of permits, conduct of public notice and public hearings and related work. At the outset the number of permits issued will be less significant than our effectiveness in laying a solid foundation for conducting the program successfully on a long-term basis. The permits actually issued will have significance as precedents in other cases, and the abatement requirements therefore should be developed with special care. It is particularly important to develop the closest possible cooperative relationships with State agencies during this initial period.

Our principal target should be to assure that permits for all significant industrial and municipal dischargers are issued prior to December 31, 1974. Accomplishment of this goal is necessary to assure appropriate time for completion of abatement programs prior to the July 1977, statutory deadline. You should begin discussions with each State to develop a strategy for achieving this objective, and the early part of the program should be designed to fit into that strategy.

Processing and issuance of permits during the early phase will require exhaustive work by all personnel in the Permit Program. Both the technical and the procedural problems will demand intensive preparation. In order to move ahead with acceptable speed, we will require establishment of deadlines for each phase of the work and all-out efforts to meet those deadlines.

Selection of Permits to be Issued

General guidance is currently being developed at Headquarters on the categories of permits that may appropriately be issued pending promulgation of effluent guidelines setting forth levels of best practicable control technology currently available for particular industries. In the meantime you should select dischargers where receiving water conditions will require more stringent abatement than the best practicable control technology standard and sufficient data is available to indicate the degree of abatement necessary to be consistent with the achievement of water quality standards. You may also, on a limited basis and with Headquarters' approval, select other dischargers where the best practicable control technology standard is expected to govern and our interim effluent guidance is sufficiently thorough and solid to give a high degree of confidence that a permit can be written that will not be materially inconsistent with effluent guidelines subsequently issued.

Duration and Validity of Permits

All permits issued in the near future, whether by EPA or by States acting under interim authorization, will have full force and effect as permits under section 402. They may have a term of not more than 5 years. Where permits are issued to reflect the best practicable control technology standard prior to promulgation of effluent guidelines, such permits will remain in effect without change notwithstanding the possibility that effluent guidelines subsequently issued might be more stringent or less stringent in certain respects. In order to assure that dischargers will move forward with the abatement programs required under permits, firmness of requirements is essential. In special cases, however, a permit may specifically provide that one or more of its terms may be modified to reflect the requirements of the subsequent effluent guidelines. For example, this approach might be taken where an unusual type of treatment facility will be required and research efforts are presently being carried out to determine the degree of effectiveness that can be obtained through such an abatement system.

Review of State Laws and Programs

It is essential that EPA respond promptly and fully to any inquiries from States concerning changes that may be necessary in existing State laws or programs to meet the requirement under section 402. The Regional Counsel in each office should work with State officials to review their laws on the basis of the materials distributed by the Administrator in his letter to Governors on December 8. The Regional Administrator should upon request specify in writing any changes in the State laws or programs that will be necessary as a prerequisite to EPA final approval of the State program. It will be helpful all around for EPA to address as many of the questions raised early and clearly. Any substantive issues raised by State inquiries should be explored in consultation with Headquarters to assure a uniform national approach.

§ § § § § § §

TITLE: Division of Authority

DATE: January 24, 1973

Your memorandum of December 29, 1972, requests an opinion as to whether a State permit program may qualify for approval under section 402(b) of the FWPCA where more than one State agency has permitting authority. Your memorandum states that in the State of Washington, the Thermal Site Council grants permits for discharges from thermal electric generating stations, although general authority to grant discharge permits is in the Department of Ecology. Similarly, you state that in Idaho, the Department of Water Administration has authority to permit discharges into wells, although general permitting authority is in the Department of Environmental Protection.

There is nothing in the FWPCA or in the EPA Guidelines published December 22, 1972 (37 FR 28390), that requires all permitting authority to be vested in one State agency in order for the State permit program to obtain federal approval under section 402(b). The basic requirement of section 402(b) is that "the laws of such State* * *provide adequate authority to carry out the described program." Neither this language, nor any language in section 304(h)(2) or in the EPA Guidelines, indicates that the authority must be vested in a single agency. The several references in the EPA Guidelines to "any State or interstate agency participating in the NPDES" (e.g., §§124.21, 124.24, 124.31, 124.34, 124.35) were not intended to preclude a division of permit issuance authority as described in your memorandum. Accordingly, in my opinion the division of permit issuance authority described in your memorandum among more than one State agency would not prevent federal approval of the State permit program under section 402(b).

Your memorandum also asks whether, if more than one State agency may have permitting authority, all the authority described in the EPA Guidelines must be vested in each agency. In determining whether all the authority described in the EPA state permit program guidelines must be vested in each State agency authorized to issue permits, the key question is whether any sharing of authority which is permitted will operate to detract from the overall effectiveness of the State's permit program. This clearly will be a case-by-case determination. I suggest that as a minimum the Attorney General when writing his opinion as required under section 402(b) of the FWPCA, identify those instances where the second agency does not have its own statutory authority or procedure for carrying out an activity required under the Act or the guidelines. In each of these instances the letter should indicate how the second agency will coordinate with the primary permit issuing agency to accomplish the task required (e.g., monitoring or enforcement). In addition, the letter should state that no conflict of authorities exists which would preclude the effective operation of the permit program for those permits issued by the second agency (e.g., legislation requiring specific matters to be taken into account with respect to power plant discharges that may be at variance with effluent standards and limitations under the FWPCA; requirements for board membership which violate the conflict of interest clauses in section 304(h)(2)(D) of the FWPCA).

§ § § § § § §

TITLE: May State Permit Programs Continue to be Operated Without an Approved Program?

DATE: April 5, 1973

This is in response to your letter of March 15, 1973, regarding the National Pollutant Discharge Elimination System under the Federal Water Pollution Control Act Amendments of 1972. You have requested some clarification on whether State permit programs may continue to be operated without an approved program under Section 402(b) of the FWPCA.

Section 402 of the FWPCA contemplates a cooperative State/Federal discharge permit program. In cases where States do not apply for or receive approval of State permit programs in conformance with the requirements of the Act, the Environmental Protection Agency is authorized to issue NPDES permits in those States. In such cases, States have an opportunity to certify discharges under section 401. On the other hand, where States apply for and receive approval of State permit programs, EPA's responsibility is to review permits and audit the performance of State permit programs, and may object to the issuance of permits under certain circumstances set forth in Sections 402(d) and (e) of the Act.

Our reading of the Act is that the system described above does not entirely preempt the operation of a State permit program which is not approved under section 402(b). Section 510 of the Act provides that nothing in the FWPCA precludes or denies the right of any State to adopt or enforce any requirement respecting abatement or control of pollution, except that a State may not adopt or enforce any effluent limitation or other standard which is less stringent than the effluent limitations and standards in effect under the FWPCA. The clear meaning of this provision is that, until limitations and standards under the FWPCA are in effect, State permits may continue to be issued and, even after the promulgation of FWPCA standards, a State permit program may impose requirements more stringent than the FWPCA standards.

Aside from the question of whether a State can issue permits pursuant to a program not approved under section 402, an equally important question is whether a State should proceed with the issuance of such State permits. Recognizing that such permits would not be issued under or enforceable pursuant to the FWPCA, it seems to us that it is highly advisable to combine the efforts of the State and Federal governments in the issuance of a single permit for each point source discharger. If the State does not have authority to issue an NPDES permit, EPA would have little choice but to proceed with the issuance of permits which may vary from the terms of any previously issued State permit, or, at a minimum, duplicate requirements already set forth in a State permit. I think it is incumbent upon both the State and Federal agencies to minimize the possibility for inconsistent requirements or duplication of requirements. In addition, there may be disadvantages in other respects to a State in not having an approved NPDES permit program, including possible adverse effects in terms of State program grants. Therefore, for the reasons stated above and others, a State should strongly consider the relative practical advantages and disadvantages for having an approved program-in addition to the much narrower question of whether such a program is necessary in the legal sense.

While I think there is good and sufficient reason to strongly urge the State of Louisiana to apply for approval of a State permit program meeting the requirements of the FWPCA, at the same time there is good reason to not break the momentum of on-going State efforts. To the extent that the State can issue permits under its on-going program prior to the application or approval of an NPDES program, it should continue to do so, but should attempt to impose requirements in conformance with the standards and deadlines set forth in the FWPCA. This would help reduce the possibiliy that currently issued permits might not be sufficient for purposes of the NPDES program when the State subsequently receives approval of its program.

§ § § § § § §

TITLE: Regulations Which Must be Promulgated Prior to Submission of Attorney General's Statement in Connection with Approval of State NPDES Programs

DATE: July 23, 1973

Several regional offices have inquired which of a State's regulations must be promulgated and in effect prior to the submission of the Attorney General's statement required by §402(b) of the FWPCA. This memorandum provides clarification of this issue.

> §124.3 of EPA's State Program Guidelines provides as follows:
>
> All authority cited by the State Attorney General as authority adequate to meet the requirements of §402(b) of the Act (a) shall be in the form of lawfully promulgated State statutes and (b) shall be in full force and effect at the time the Attorney General signs the Attorney General's statement.

In other words, the statute requires that all of the authorities listed in §402(b) must be in full force and effect before the Administrator may approve a state's program. It was to dispel doubt as to the required extent of authorities under §402(b) that Appendix A, the form of Attorney General's statement, was developed. Although Attorney General's statements are not required to follow this format precisely, they must cover every authority cited in Appendix A and must identify, for each authority listed in the Attorney General's statement, the applicable State statutes or regulations. It is our view that Appendix A embodies the minimum state authorities necessary to support approval of a program - that is, the Administrator could not legally approve a program where each of these authorities could not be demonstrated to exist.

For this reason, it would not suffice for a State to submit an Attorney General's statement based upon a broadly worded statute conferring discretionary authority upon (for example) the Director of a State agency to adopt regulations which would constitute an approvable program. In such cases, regulations must be promulgated and in force at the time that the Attorney General's statement is submitted, and the regulations must encompass the full range of authorities required by the Act and Appendix A. For example, a state statute might authorize the director of the State water pollution control agency to issue permits under "such regulations as he deems appropriate." In such a case, regulations must be promulgated and in force providing that the director shall apply effluent limitations and standards under §§301, 302, 306, 307 and 403 of the Act.

The only exceptions to the requirements outlined herein are those authorities required in paragraph 8 of the Attorney General's statement which are purely ministerial in nature -for example, authority to transmit documents to and from the Environmental Protection Agency, or to provide public notice of proposed permit issuance actions. It is expected that these purely ministerial acts will be accomplished pursuant to the permit program agreement between the State and EPA, and the details of such procedures need not be established by regulations prior to the submission of the Attorney General's statement.

§ § § § § § §

TITLE: State Permit Program Authorities -- Civil and Criminal Penalties

DATE: May 31, 1973

There has been a great deal of discussion -- and some degree of confusion-- over the past few months regarding EPA's guidelines for State civil and criminal penalties under Section 402(b)(7) of the 1972 Amendments to the FWPCA. As you know, the State Program Guidelines, published on December 22, 1972, require that such penalties must "(1) be comparable to similar maximum amounts recoverable by the Regional Administrator under section 309 or (2) represent an actual and substantial economic deterrent to the actions for which they are assessed or levied." There have been varying interpretations, however, of the meaning of "comparability" and "actual and substantial economic deterrent."

The controlling Agency policy was set forth in Instructions and Comments attached to "Appendix A to Instructions for Approval of State Permit Programs," the State Attorney General's Statement distributed to the regions on March 28, 1973. Point 11b of the Instructions and Comments provides:

> "The maximum civil penalties and criminal fines recoverable under State law must be comparable to maximum amounts provided in Section 309 of the FWPCA or must represent and actual and substantial economic deterrent. This means, in applying either criterion, EPA expects that such maximum penalties and fines be equal to or of the same order of magnitude as the amounts provided in Section 309."

Our policy is to require States to have authority to impose maximum penalties and fines of $10,000 and $25,000, respectively, as provided in Section 309. We believe that adoption of these statutory penalities is essential in almost every State for an effective program. There may be a few States in which lower penalties would constitute an actual and substantial economic deterrent. Accordingly, we will consider requests for approval of a State program providing maximum penalties lower than those set forth in section 309, but in no case less than a maximum civil penalty of $5,000 a day, and a maximum criminal penalty of $10,000 a day, in those few instances where:

(1) There is only a small number of major dischargers within the State; and

(2) Most of the industries discharging within the State have sufficiently low earnings that the proposed lower fines would constitute an effective deterrent; and

(3) The program is fully approvable in every other respect.

There are, in addition, apparently five States in which decisions regarding maximum penalties have been taken in reliance upon representations by EPA officials that maximum civil penalties as low as $5,000 a day, and maximum criminal penalties as low as $10,000 a day, would be acceptable. EPA has an obligation to minimize the burden which would be placed upon these States by inflexible application of the policy set forth above. Accordingly, we will consider approval of these few state permit programs where, in reliance upon representations by EPA officials, the State has either enacted, or has taken substantially irrevocable decisions toward enacting, legislation with lower penalties than those set forth in the statute. Where such a program is approved, the State will be advised in the approval letter that it will be expected to request its legislature, as soon as possible but not later than the next legislative session, to establish maximum penalties equal to those in the statute. In no case will a program be approved which includes less than a maximum civil penalty of $5,000 a day and a maximum criminal penalty of $10,000 a day.

According to our most recent information, 27 States have either enacted or proposed legislation establishing maximum penalties and fines of $10,000 and $25,000, respectively. We must make it clear to these States that we strongly support their efforts in this regard, and we must keep to a very bare minimum the number of programs approved with lower penalties. Quite apart from the potential dampening effect on State enforcement efforts, any indication from EPA that we would be willing to accept lower penalties, except in the strictly limited circumstances set forth herein, would amount to a failure to keep faith with those States which have sought or are seeking to obtain the statutory maximum penalties. For this reason also, it bears emphasis that any State seeking approval of a program providing lower penalties must carry the burden of demonstrating that it meets the criteria set forth in this memorandum.

§ § § § § § §

TITLE: Federal vs. State Water Permits

DATE: June 4, 1973

We have received several inquiries concerning the degree of preemption of NPDES permits issued by EPA over non-NPDES permits which have previously been issued by States or may be issued by States in the future. The simple answer is that a preemption exists only where the State program is in any way less stringent than the Federal program.

Section 501 of the Federal Water Pollution Control Act specifically reserves to all States, political subdivisions thereof, or interstate agencies, the right to adopt or enforce "any standard or limitation respecting discharges of pollutants," or "any requirement respecting control or abatement of pollution. . . ." The only qualificaiton to this express reservation of States' rights applies when an effluent limitation or other requirement, including an NPDES permit, has been established under the FWPCA. In any such case, a State is prohibited under §510 from adopting or enforcing any requirement less stringent than the Federal requirement.

The FWPCA, in view of Section 510, clearly does not prohibit a State from issuing in the future discharge permits more stringent than permits issued by EPA under the NPDES. Moreover, the issuance by EPA of an NPDES discharge permit does not invalidate a more stringent permit previously issued by a State.

As a matter of policy, it is clear that States should attempt to receive approval of State NPDES permit programs in order to avoid the problems presented by the operation of two permit systems within a State. This does not, however, diminish a State's legal authority to issue more stringent non-NPDES permits.

This key point should be emphasized to industries and other dischargers receiving NPDES permits. Accordingly, each NPDES permit which is issued by EPA should be accompanied by a statement notifying the discharger that the NPDES permit which is being issued to him may well not create any absolute right of discharge, even in accordance with its terms. A discharger is not thereby relieved from responsibility from complying with any more stringent requirements which a State may have adopted or choose to adopt.

The Federal Water Pollution Control Act is based upon the concept that the primary responsibility for pollution control rests with the States, and we must acknowledge the right of any State to establish even more stringent controls on pollution than can be achieved by a national program.

§ § § § § § §

TITLE: Ability of States to Enforce Federally Issued NPDES Permits

DATE: July 10, 1973

QUESTION:

Is a State authorized to enforce permits issued under the NPDES by EPA?

ANSWER:

The only means available under the FWPCA for a State to enforce the terms and conditions of a federally issued NPDES permit would be to commence a citizen suit under section 505. However, depending upon State constitutional and other restraints, a State may arrange for such permits to be enforceable under its own law, or it may issue duplicate permits under State law which would then be enforceable in State courts.

DISCUSSION:

Only two means are available under the FWPCA for enforcement of NPDES permits: direct enforcement by the Administrator under section 309, and citizen suits under section 505. Section 309 is available only to the Administrator of the Environmental Protection Agency. No authority is conferred by §309 upon the States. However, §505 authorizes any "citizen" to commence a civil action on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation under the Act or an order issued by the Administrator or a State with respect to such standard or limitation. The term "citizen" is defined in §505(g) as "a person or persons having an interest which is or may be adversely affected." "Person" is defined in §502(5) to include any State. It is clear, moreover, that any effluent standard or limitation included in an NPDES permit would be "an effluent standard or limitation under this Act" within the meaning of §505(a)(1)(A). Accordingly, citizen suits would be available to States for enforcement purposes.

Other options are available to States under State law for the enforcement of NPDES permits. If a State has a permit system, it can issue a permit to a discharger containing the same terms and conditions as an NPDES permit. Again, this procedure may prove cumbersome, in that State permit issuance procedures would duplicate NPDES permit issuance procedures. A right to a hearing and to administrative and judicial review might be available to the discharger both under State and federal law. This inconvenience might be reduced somewhat, however, if the State and EPA hold joint hearings for issuance of their respective permits.

Finally, a State might choose to enact a statute incorporating the provisions of the FWPCA by reference. A precedent in federal statutory law is the Assimilative Crimes Act, 18 U.S.C. Section 13, which incorporates State criminal law for areas subject to exclusive federal legislative jurisdiction. In this context, such a statute might provide that the violation of any term or condition of a permit issued by the Environmental Protection Agency under §402 of the FWPCA would be subject, under State law, depending upon whether it comported with other State statutory and constitutional requirements concerning due process and administrative procedure.

It should be emphasized that neither the model State NPDES statute developed by the Council of State Governments nor the laws of California, at present the only State to have received approval for its NPDES program, include authority for the State to enforce federally issued permits. Such authority is not required by EPA's State program guidelines, nor is it required by the FWPCA. Moreover, it would be unwise to amend the guidelines to require such authority at this point, since one program has been approved, several others have been submitted, and many State legislatures are enacting statutes not including such authority in reliance upon our guidelines and upon the model State law.

We may wish to consider amending the State program guidelines to authorize, but not require, a State to utilize abbreviated procedures when issuing a State permit identical to a previously-issued Federal NPDES permit. Such a procedure would allow States which have not yet enacted NPDES statutes to establish procedures simplifying enforcement of NPDES permits issued by EPA prior to program approval. At the same time, since the procedure would be optional, there would be no effect on programs already approved.

Before any such move is concluded upon, however, we should seriously consider its implications in the light of Buckeye Power v. EPA, when the Court of Appeals for the Sixth Circuit observed, at note 2, that where the requirements of State implementation plans under the Clean Air Act would be enforceable either in State or Federal Courts, the first court to acquire jurisdiction would have exclusive jurisdiction, and its judgments would be res judicata with respect to any future litigation. By implication State courts could make binding determination with respect to federally issued NPDES permits. Since we will attempt to accord priority in permit issuance to major dischargers, we might well look askance at a policy which could ultimately wrest from the Federal courts the power to construe these crucial permits and their conditions.

§ § § § § § §

TITLE: Extent of Environmental Protection Agency Approval of State Issued NPDES Permits

DATE: July 18, 1973

This is in response to your memorandum of May 31, in which you inquired as to the extent of EPA's authority to object to the issuance of a permit by a State after approval of the State's NPDES program under §402(b) of the FWPCA. Your questions, and answers, follow.

QUESTION:

Suppose a State issued a permit for which we didn't object under permanent authority and the permittee appealed the issuance to an independent Board of Review with the power to modify the permit:

(1) If the board exercised its power and modified the permit without sending the permit back to the State issuing agency, can the Environmental Protection Agency object to its issuance?

(2) If the Board sent the permit back to the State agency for issuance with the limits defined, can the Environmental Protection Agency object to its issuance?

(3) The same as 1 and 2 above except that the Court of Appeals takes the action rather than the Board.

ANSWER:

Under §402(d)(2), in any of the situations described above, the permit may not be issued by the State if the Environmental Protection Agency objects to its issuance as being outside the guidelines and requirements of the Act.

DISCUSSION:

Section 402(d)(2) of the FWPCA provides that "No permit shall issue. . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act." The clear intent of this provision is to ensure that permits issued by the States comply with the guidelines issued by EPA under §304 and other provisions, and with the requirements of the Act. There would be no doubt that the Administrator's objection would preclude issuance of a permit in any of the three situations described in the question, were it not for the limitation of the Administrator's action to objection "within ninety days of the date of transmittal of the proposed permit by the State. . . ." This is language, it may be argued, prohibits the Administrator from exercising his power to veto permit issuance except in the case where a State, before formally issuing a permit, transmits a proposed permit to the Administrator for review.

This argument, however, ignores the intent of the provisions. The apparent purpose of the ninety-day limitation is to ensure that the Administrator takes prompt action on permits submitted by States. To construe the term "proposed permit" in the statue to prohibit veto by the Administrator of permits altered by a review board or by a court, or by order of a board or court, would frustrate the intent of §402(d)(2) to ensure that pemits comply with "the guidelines and requirements of [the] Act."

The reference to "proposed permit" in §402(d)(2) merely indicates that the drafters anticipated a procedure whereby a proposed permit would be transmitted to the Administrator, the Administrator would review the permit and decide whether or not to exercise his veto power, and the State would then issue the permit. Indeed, in most cases, this is the procedure which will be followed. There is no evidence, however, of any legislative intent that the two words "proposed permit" be read as a limitation on the Administrator's authority. They may instead be construed to mean that no permit is final until the Administrator has exercised his statutory review powers. Under this reading of §402(d)(2), the permit must be said to be a "proposed permit" at both stages in the procedure: before issuance, and, if modified by a board or court of review, after such modification. Under this reading of the statute, a State could not render the review provisions of §402(d)(2) inoperative by the device of a bifurcated review procedure whereby power to modify a permit (in effect, real control over permit issuance), reposes in a review board or a court.

ANSWER:

Any modification of an NPDES permit by a State constitutes a reissuance, and is subject to review by the Regional Administrator under §402(d) of the Act. However the Administrator may by regulation waive his review of various classes of permits or types of modificaitons.

DISCUSSION:

§124.72 of the State program guidelines sets forth two procedures for modification, after issuance, of NPDES permits. Under §124.72(b), a schedule of compliance in a permit may be modified or revised where good and valid cause (such as an Act of God, strike, flood, materials shortage, or other event over which the permittee has little or no control) exists for the modification. Section 124.72(b) of the regulations specifies that all such modifications must be reviewed by the Regional Administrator.

By contrast §124.72(a) provides a procedure where permits may be "modified, suspended, or revoked" for "cause including, but not limited to [(1) violation of any terms or conditions of the permit; (2) obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; and (3) a change in any codition that requires either a temporary or permanent reduction or elimination of the permitted discharge.]" This procedure is based directly upon §402(b)(1)(C) of the Act. The guidelines do not specify that the Administrator would exercise review authority over such modifications. However, the omission from the guidelines of the requirement for review by the Regional Administrator is not dispositive. It is clear that any modifications, including those contemplated by §124.72(a) , would amount to a reissuance of the permit, requiring an opportunity for review by the Regional Administrator under §402(d) of the Act. Any other construction of the guidelines, or of §402(b)(1)(C) of the Act, would defeat the purpose of §402(d) to preclude the issuance of permits which are outside the guidelines and requirements of the Act. If, for example, a State were to issue a permit, then to modify the permit "for cause" after the time period for objection to the original permit under §402(d) had passed, in a manner that made the permit violative of the guidelines and requirements of the Act, no reasonable construction of the Act would preclude the Administrator from reviewing the modifications under §402(d).

Under certain curcumstances, such as various types of de minimis modifications of issued permits, it may prove cumbersome in practice for the Regional Administrator to review all modifications of issued permits. In that event, when a State's NPDES program is approved, a waiver of our review authority could be worked out for certain types of permit modifications.

§ § § § § § §

TITLE: Conflict of Interest

DATE: February 14, 1973

A great deal of discussion recently has centered around the application of the conflict of interest provision in Section 304(h)(2)(D) and EPA's Guidelines (Section 124.94) relating to State agency board membership.

The Act requires that a State requesting final approval of its permit program submit a full and complete description of the program it proposes to establish and administer under State law and a statement from the attorney general that the laws of the State provide adequate authority to carry out the described program. In addition, the Act requires that any State permit progam at at all times be in accordance with the Guidelines promulgated under section 304(h)(2), including the conflict of interest provision.

At the time the State requests final approval of its program the State must certify that the board membership is in compliance with the conflict of interest provisions. It is incumbent upon the State to make specific determinations regarding the qualification of individual board members. Although the state's certification of compliance with Section 304(h)(2)(D) is not conclusive upon EPA, it should be given considerable weight in reviewing the State's program submission.

An enormous number of questions may arise regarding the application of the conflict of interest provision to specific cases. These questions require both legal and factual determinations. EPA has a major responsibility to provide guidance on the legal issues. With respect to factual determinations, however the initial and principal responsibility should be exercised by the States. For this reason, EPA regional officials should avoid making formal determinations concerning application of the conflict of interest provision to specific individuals, at least until after the State has submitted its application for final approval of its permit program.

In order to assist the Regions and the States further it is desirable that additional guidance be given on a number of situations which occur frequently in State board membership. The following is intended to provide such guidance.

Government Employment

State employment. Many state facilities will require Section 402 discharge permits. If the term "permit holders or applicants for a permit" included State agencies or facilities, all State officials and employees would then be disqualified from membership on State boards. Since the state is to administer the permit program, it would be impossible to apply an interpretation of the statute requiring that a state employee be disqualified from board membership where his only "conflict" is the receipt of income from the state. Therefore, state department and agencies are not deemed to be permit holders or applicants for a permit for purposes of this provision. This position is set forth in section 124.94(c) of the guidelines.

Municipal employment. Most, if not all, municipalities will have sewage treatment works and other discharges subject to permitting under section 402. The rationale above relating to state agencies or departments does not apply to municipalities. Municipalities are subject to regulation under the permit program in the same manner as other point source dischargers. They, unlike states, however, have no responsibility under section 402 to administer the program.

Federal employment. EPA's proposed regulations for the Federally operated permit program (38 F.R. 1362-1370, 40 CFR Part 125) provide that ". . . with respect to federal agencies and instrumentalities, ... the Administrator will continue to process permit applications in accordance with these regulations and will be the exclusive source of permits." Although Federal facilities must obtain discharge permits, an employee receiving a significant portion of his income by virtue of Federal employment is not disqualified since EPA, rather than any State board, will be issuing permits to Federal facilities.

Corporate or Institutional Employment

In some instances, existing board members may receive income from institutions or corporations which operate facilities subject to permitting under section 402. It may be argued that such persons should not be disqualified if they have no connection with the management or operation of discharging facilities, or budgetary decision-making that would affect such management. The conflict provision makes no such distinction, however, nor can such a distinction reasonably be implied. Thus, even though the connection between the nature of employment of the individual and the operation of a discharge facility may be tenuous or remote, it is clear that the provision is tied to the receipt of income from the institution or corporation, and not the nature of the person's position within the institution or corporation.

It should also be noted that the statutory prohibition applies irrespective of whether the employer is a non-profit organization such as a university or research institution. The test is simply whether the employer is a "permit holder or applicant for a permit."

Professional employment.

In many cases, existing board members such as lawyers, engineers, or stockbrokers may work for firms which do not have discharges subject to section 402 (and therefore the firms themselves would not be "permit holders or applicants"), but whose income is derived principally from clients with discharges subject to section 402. If the person is an owner or partner of the firm, such that he receives a direct share of the firm's profits, he then receives income from clients who are or may be permit holders or applicants. In such a case, if a significant portion of the firm's income (i.e., 10% or more under section 124.94(b) of EPA's Guidelines) is received from permit holders or applicants, the owner or partner would be disqualified.

Disqualification of owners or partners of such firms would be required by the conflict provision even though the individual's work for a client permit holder or applicant is not directly related to pollution control problems arising under the FWPCA. As noted in the preceding section, the provision makes no distinctions concerning the nature of the tasks performed by the individual.

An employee of a law firm, consulting engineering firm, stock brokerage firm, or other similar professional organization (which itself is not a permit holder or applicant) receives a salary from the firm, and therefore does not receive income from client permit holders or applicants by virtue of his receipt of salary from such firm.

Special Categories of Income

Employment income within past 2 years. Section 304(h)(2)(D) requires disqualification of board members who have received a significant portion (i.e., 10% or more) of their income from permit holders or applicants within the preceding two years.

Retirement income. Even though one is presently retired from employment by a permit holder or applicant and is receiving retirement income rather than an employee salary, the conflict provision would require disqualification if he receives a significant portion of his income from such source. However, since a retired person's future income status generally is less tied to his former employer's interest than would be the case if he were currently employed by a permit holder or applicant, the Guidelines provide that the term "a significant portion of this income" shall mean 50% of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement."

Income from diversified investments. The Guidelines provide in Section 124.94(e) that "income is not received directly or indirectly from permit holder or applicants for a permit" where it is derived from mutual-fund payments, or from other diversified investments over which the recipient does not know the identity of the primary sources of income.

Pension plan income. Pension plans normally are set up as separate trusts, or other distinct legal entities, not subject to direct control by the employer, and provide periodic benefits to retired employees. Amounts received by particular beneficiaries are fixed according to the plan and are unrelated to the current fortunes of the employer. Therefore, where a board member receives income pursuant to a pension plan under the control of an entity other than his former employer, this income would not appear to produce a conflict within the scope of section 304(h)(2)(D), even though the income received may exceed the applicable retirement income percentage.

Stock dividends. Even though stock dividends ordinarily could not be affected by a company adversely to the interest of a board member entitled to receive dividends, the amount of such dividends would be directly tied to the fortunes of that business and/or related businesses. If the amount of such dividends, either separately or together with other income, exceeds the applicable percentage the recipient would be disqualified from serving on the board. Therefore, stock dividends are specifically included within the term "income" under section 124.94(d) of the guidelines.

Permit holders or applicants other than under the FWPCA.

There is no indication in Section 304(h)(2)(D) that the conflict of interest provision is intended to be one broadly aimed at excluding conflicts with respect to permits not issued under the Federal Water Pollution Control Act. Therefore, if a board member receives or has received income from a company or other entity which is subject to permitting under State or Federal legislation other than the FWPCA (e.g., air or solid waste permit requirements), such income would not require disqualification under section 304(h)(2(D).

Directors, Executive Secretaries or other employees of a State Board

The guidelines provide that the term "board or body" includes any individual including the Director, who has or shares authority to approve permit applications or portions thereof either in the first instance or on appeal. Therefore, any Director or other employee who has authority, in full or in part, to approve permit application and who either currently receives or has during the previous 2 years received 10% or more of his gross-personal income from a permit holder or applicant is disqualified from serving in the position indicated above.

Board relationships which may mitigate the consequences of a conflict with Section 307(h)(2)(D).

Assuming that one or more board members fall within the conflict of interest provision, various proposals have been suggested to make it possible for the State to retain these board members and continue to operate its permit program under other organizational arrangements.

Removal of permit issuing decision from the Board. A State may wish to place the responsibility and power to make final determinations on permit applications on an employee of the board, such as a Director or Executive Secretary. For his proposed arrangement to comply with section 304 (h)(2)(D), and EPA's Guidelines (Section 124.94(a)), the Director or other employee would have to have complete authority to rule on permit applications, and he himself must be free of a conflict of interest. In order to maintain the insulation of the board from the decision on individual permits, a right of appeal to the full board would not be permissible. In addition to the authority to issue permits, the employee also would have to have authority to perform other acts necessary to the administration of the permit program as required under section 402(b) and EPA's Guidelines. Otherwise, the mere insulation of the issuance function probably would not be sufficient to remove the board from the thrust of section 304(h)(2)(D) to eliminate conflicts which would tend to inhibit aggressive administration of state permit programs. Finally, the Director must be able to issue permits, and otherwise independently administer the permit program, without being subject to control by a State board which does not meet the requirements of section 304(h)(2)(D).

Non-participation by a board member on certain permit applications. It has been suggested that the conflict of interest provision might be avoided by requiring a member with a conflict to abstain from ruling upon permit applications in which he has or may have an interest which causes a conflict. This is not a viable alternative, in view of the flat proscription against board membership where the particular member has received a significant portion of his income from permit holders or applicants. Since the provision applies to permit holders, as well as applicants, there would be a continuing conflict.

Application of Section 304(h)(2)(D) immediately or through attrition. It may be suggested that the requirements of section 304 (h)(2)(D) can be applied as and when vacancies on State boards occur, rather than immediately. Section 304(h)(2)(D) is part of a series of requirements which must be met by States prior to approval of their permit programs. Therefore, deferral of compliance with the provision during a transitional period cannot be permitted under the statute.

§ § § § § § §

EFFLUENT GUIDELINES

TITLE: **Authority for EPA to Issue Discharge Permits Prior to Publication of Effluent Guidelines Under §304**

DATE: December 4, 1972

QUESTION:

Dose the Administrator of the Environmental Protection Agency have the authority to issue permits under §402 of the Federal Water Pollution Control Act before the issuance of guidelines for effluent limitations under §304(b)?

ANSWER:

Yes.

DISCUSSION:

§402(a)(1) of the Federal Water Pollution Control Act authorizes the Administrator to issue permits for the discharge of pollutants "upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." (Emphasis supplied). The Administrator is required to prescribe conditions for permits to assure compliance with these requirements, (§402(a)(2)).

The "necessary implementing actions" refered to in §402(a)(1) would include the publication of guidelines under §304, even though that section is not specifically designated. One of the designated sections is §301, which includes a requirement for effluent limitations applying best practicable control technology "as defined by the Administrator pursuant to §304 of this Act. . . ." (§301(b)(1)(A)).

If §402(a)(1) and §402(a)(2) are read together, their plain meaning is that the Administrator is to issue permits in the period prior to the issuance of guidelines for the determination of "best practicable control technology currently available" under §304, but he is also to apply conditions to such permits in order to "carry out the provisions of this Act."

The argument may be advanced that Congress expected that effluent limitation guidelines would be published immediate upon enactment of the bill, and that there would be no interim period. However, in §515, Congress specifically required submission of a notice of intent to propose guidelines to the "Effluent Standards Water Quality Information Advisory Committee" no later than 180 days prior to the date on which they are required to be published as proposed regulations. The committee is required to submit scientific and technical information to the Administrator within 120 days of receiving the notice of intent. This section clearly contemplates that the guidelines will not be published until after the Administrator has received the information from the Committee, an event which would not be expected to occur until at least five or six months after enactment.

The legislative history is also barren of any support for the view that the Administrator may not issue permits until after publication of guidelines under §304. There is, however, clear support for the contrary view. The House Committee, for example stated:

> "The committee further recognizes that the requirements under sections 301, 302, 306, 307, 308, 316 and 403 will not all be promulgated immediately upon enactment of this bill. Nevertheless, it would be unreasonable to delay issuing of permits until all the implementing steps are necessary. Therefore, subsection (a)(2) provides that prior to the taking of the necessary implementing actions relating to all such requirements, the Administrator may issue permits during this interim period with such conditions as he determines are necessary to carry out the provisions of this Act. Thus, the new permit program may be initiated without undue delay upon enactment of this Act." H. Rept. No. 92-911 at 126 (1972).

That the Administrator may issue permits immediately following enactment was emphasized by Senator Muskie in an anlaysis submitted for the record on the day the conference bill was passed by the Senate. Senator Muskie stated that "the Administrator may immediately act on pending permit applications." Cong. Rec., Oct. 4, 1972, at S. 6875.

In short there is no basis in either the statute or the legislative history for any conclusion other than that the Administrator may begin immediately to issue permits under §402 of the Federal Water Pollution Control Act, before the promulgation of guidelines under §304.

§ § § § § § §

TITLE: Revision of Permits Upon Later Issuance of Guidelines for Effluent Limitations Under §304

DATE: December 11, 1972

QUESTION:

Can permits issued pursuant to section 402 by the Environmental Protection Agency be revised upon later issuance of guidelines for effluent limitations under section 304?

ANSWER:

Permits may be issued subject to the condition that they will be reopened and the terms revised when effluent limitations are issued. Alternatively, permits may be issued for short periods of time -- one year or two years -- to allow for revisions subsequent to promulgation of effluent limitation guidelines. However, unless either of these steps is taken, permits would not be subject to revision upon later issuance of guidelines under section 304.

DISCUSSION:

Section 402(b)(1)(C) of the Federal Water Pollution Control Act requires State program to include authority to issue permits which "can be terminated or modified for cause including but not limited to the following:

(i) violation of any condition of the permit:

(ii) obtaining a permit by misrepresentation, or failure to disclose fully relevant facts:

(iii) Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. . . ."

Whether or not permits may be revised upon subsequent promulgation of effluent guidelines depends upon whether such action could be called termination or modification "for cause." The legislative history is silent with respect to what types of actors would be sufficient to provide the "cause" required by the statute, and whether the issuance of effluent guidelines would constitute a changed condition requiring reduction of the permitted discharge.

However, the intent of Congress in this regard appears to be expressed by section 402(k), which provides that "compliance with a permit issued pursuant to this section shall be deemed compliance. . . with sections 301, 302, 306, 307 and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health." This section is intended to insulate a discharger in possession of a validly issued permit from prosecution for violations of subsequently issued requirements, except for discharge of toxic pollutants injurious to human health. As a practical matter, it would in fact be difficult to bring an enforcement action based on subsequently promulgated effluent guidelines, because it is doubtful that such guidelines will be sufficiently precise to be applied automatically to a given discharge. Discretion must be exercised in applying the guidelines to individual dischargers. Effluent standards under section 307(a) may be distinguished from effluent guidelines in that they apparently are intended to be automatically applicable. This distinction is recognized in section 402(k).

If it is the intent of the program to revise permits as effluent guidelines are promulgated, this may be legally done either by inserting conditions in all permits that they will be subject to revision upon the promulgation of effluent guidelines (the Administrator has board discretion under section 402(a)(1) to establish such conditions as he determines "are necessary to carry out the provisions of this Act") or by limiting the duration of permits to one or two years, thus providing for early revision.

§ § § § § § §

TITLE: Effluent Limitations to be Applied to Industrial Dischargers Now Applying Better Treatment than Effluent Guidelines Require

DATE: August 8, 1973

QUESTION:

What effluent limitations must be imposed upon a discharger whose effluent quality exceeds that which would be required by effluent guidelines now under development?

ANSWER:

In general, effluent limitations dictated by effluent guidelines must be applied unless a more stringent limitation is required to meet any requirements of State or Federal water quality standards, or other Federal or State laws or regulations. Where water quality standards include a "non-degradation" requirement, that requirement must be applied to a discharger, and may require the discharger to maintain an existing high-quality effluent. However, the application of the "non-degradation" requirement would depend on the circumstances; we cannot say that it would always operate to require maintenance of an existing high-quality effluent.

DISCUSSION:

As you know, industrial point source dischargers must, under §301(b)(1)(C), achieve by July 1, 1977, any more stringent effluent limitations than those required by application of the best practicable control technology currently available, which are "necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations. . . .or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." In this connection, the "non-degradation" policy announced by Secretary of the Interior Udall prior to the establishment of EPA has been incorporated by the States into water quality standards. Under §303 of the Act, standards established by States prior to the enactment of The FWPCA Amendments of 1972, and not disapproved by the Administrator, remain in effect and must be applied under §301(b)(1)(C).

"Non-degradation" requirements generally apply to waters which are of better quality than required by water quality standards. Moreover, each includes an "escape clause" allowing some degradation where justified on the basis of social and economic necessity. Beyond these two points, however, we cannot state categorically how "non-degradation" requirements of State standards should be applied. First, each state enacted or otherwise promulgated its own "non-degradation" requirement. The language in which the requirement was cast varied from State to State. Many States limited the "non-degradation" requirement to new sources.[1] Moreover, each State's requirement must be considered in the context of State law as a whole; similar language may be construed differently in different States. Finally, most States reserved to themselves the right to determine whether or not lowering existing high-quality waters would be justified on the basis of social and economic necessity, committing themselves only to advise the Federal government of their determination. Accordingly, whenever a permit is issued to a discharger into waters of better quality than that required by standards, an assessment must be made of the requirements of State law in that instance.

---

[1] In the only case construing a non-degradation requirement, the State court held, on the basis of the statement of purpose in the State statute, that the "non-degradation" requirement applied only to new sources. Reserve Mining v. Minnesota, 2 FRC 1135, 1140 (Minn. Dist. Ct. 1970). Yet the classical statement of the Federal policy would also apply to issuance of a permit to an existing source.

It would appear that in most cases the States would be best situated to make this determination, particularly in view of their retention of final authority under state "non-degradation" policies. The vehicle for this determination is provided in section 401, requiring State certification of compliance with State water quality requirements. While the Administrator or the State, in issuing permits, must apply all State requirements, I believe that we would be entitled to treat a certification, with conditions, as conclusive regarding the requirement of State "non-degradation" laws.

§ § § § § § §

TITLE: Must Effluent Guidelines Establish a Range

DATE: August 8, 1973

QUESTION:

Must regulations promulgated under section 304(b)(1) of the FWPCA establish a range of effluent limitations which would allow variations in the terms of individual permits based upon the factors listed in section 304(b)(1)(B)?

ANSWER:

Although a range of effluent limitations may be established under section 304(b)(1) such a range is not a mandatory requirement.

DISCUSSION:

The Department of commerce has taken the position (as stated in Mr. Karl E. Bakke's letter to the Office of Management and Budget dated May 15, 1973) that:

> ". . . the best practicable control technology currently available for a given industrial category must be established as a range of numbers to allow consideration of the factors [listed in section 304(b)(1)(B)] in the application of the effluent limitations to individual point sources."

Section 304(b)(1)(B) provides that the Administrator shall:

> "(B) specify factors to be taken into account in determining the control measure and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes [of point sources]. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of the Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate."

Neither this language, nor the language from section 304(b)(1)(A) quoted by Mr. Bakke on page 1 of his letter, appears to establish a requirement for a range of effluent limitations for each category of point sources. The language in section 304 (b)(1)(A) requiring that regulations identify "the degree of effluent reduction attainable. . . for classes and categories of point sources" is susceptible to a reading that a range may or may not be stated. Indeed, since the language uses the singular (i.e., the degree of effluent reduction), it may imply that a single number is to be stated for a class or category of sources.

Similarly, the language of section 304(b)(1)(B) does not appear conclusive with respect to just when and how the listed factors are to be taken into account. It may be noted, however, that if the intention had been to require application of these factors both when establishing regulations identifying the "best practicable control technology currently available" under section 304 and when writing permits under section 402, Congress could have easily expressed this intention in either section of the Act. There is no indication in either of these sections that Congress did so intend. Notably, when listing the conditions to be applied in all permits issued under section 402(a)(1), section 304(b) is not listed, though several other sections are specifically identified. Also, there is evidence in both the bill as passed, and earlier predecessors in the House and Senate, that any requirements for a permit-by-permit analysis will be expressly stated (cf., §301(c) of the Act as passed; §301(b)([illegible])(A) of S. 2770 and H.R. 11896; and §301(b)(3) of the H.R. 11896). Finally, several of the factors listed in section 304(b)(1)(B) simply seem to make more sense if considered on an industry-wide basis rather than on an individual point source basis (e.g., total cost of application of technology in relation to the effluent reduction benefits to be achieved, non-water quality environmental impact (including energy requirements)).

On the other hand, the language of section 304(b) does not appear to specifically preclude establishment of a range of effluent limitations in section 304 (b) regulations or, within such a range, application of the factors listed in section 304(b)(1)(B) in individual permits. There is some legislative history calling this into question however:

> The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class. (Detailed Statement on Conference bill inserted by Senator Muskie, Cong. Rec. S 16784, October 4, 1972; Legislative History of the Federal Water Pollution Control Act Amendments of 1972, Senate Comm. on Public Works, 93rd Cong., 1st Sess. at 172 (Comm. Print 1973)("Leg. Hist.")).

In addition, the Conference Report States:

> "Except as provided in section 301(c) of this Act, the intent of the Conference is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."

(S. Rep. No. 92-1236 at 126; Leg. Hist. 309). (Further indications that the section 304(b)(1)(B) factors are to be taken into account at the regulation writing rather than permit issuing stage are contained in the legislative history as follows: Leg. Hist. 169, 170, 237-38, 263, 378-379, 794-795 and 1391.)

Mr. Bakka relies upon the following language contained in the Senate Report:

> "It is the Committee's intention that pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator will interpret the term "best practicable" when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by January 1, 1976. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within the category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level."

(S. Rep. 92-411, at p. 50; Leg. Hist at 1468).

The methodology of the Effluent Guidelines Division squares with this language. For example, a range of 23 effluent limitations will be applied within the broad category of iron and steel manufacturing for the 23 subcategories which are planned. Those subcategories are based upon the section 304(b)(1) factors referred to in the Senate Report.

To resolve any remaining ambiguity in the statute or the legislative history the best course would appear to examine the overall purpose of the section 304(b)(1) factors. The Congressional mandate to consider these factors clearly facilitates the stated intention of Congress to apply uniform standards on a national basis. This can only be done fairly if differences among sources within a category are taken into account in establishing effluent limitation numbers. The primary approach taken by the Effluent Guidelines Division has been to divide the broad industrial categories (such as those listed under section 306 of the Act for new sources) into many subcategories based upon the section 304(b) factors. In most instances this will sufficiently take account of differences among types of plants within a broad category to enable a fair uniform national guideline for plants within the subcategory. In some instances there may be a need for still further variations within the subcategory to take account of identified differences within that category. For example, a recent proposal, which as I understand it is under consideration in draft proposal regulations for the beet sugar subcategory, contains the provision that in the event that adequate land is not available -- as specified by a formula--then the effluent limitation would be 2.2 kg/k of raw sugar refined rather than "no discharge" of process waste water pollutants.

The more the looseness in the effluent limitation guideline at the permit writing stage, of course, the more the national uniformity requirement is frustrated. In addtion, to the extent that the standards are open ended, protracted negotiations may greatly hinder the permit program. Ambiguities in the required standards from permit to permit will also create considerable problems of review of permit issuance actions by states where this review is from the point of an interested citizen, EPA exercising its authority under section 402(d), or judicial review. The same problems would be posed to a State, citizen or Court reviewing the propriety of an EPA issued permit. These considerations argue in favor of as precise a national standard as possible. This should be facilitated by the subcategorization approach which allows application of the factors listed in section 304(b) to provide for fair effluent limitations which do take account of differences within the industry.

In any event, the statute requires essentially a common sense approach which should result in regulations which are specific and uniform and yet also fair in their application to differing types of plants. This may require subcategorization in some cases and application of a range in others. However, there is simply no flat requirement in the statute that the section 304(b) factors be applied only at the regulation writing stage or always at the permit issuance stage; nor is there an across-the-board mandate for effluent limitations to be stated in a range in all cases.

§ § § § § § §

TITLE: Section 316(b)

DATE: January 17, 1973

You have asked for my opinion on the question of whether section 316(b) of the Federal Water Pollution Control Act, as amended, is effective immediately, or is effective only after effluent standards applicable to thermal discharges have been promulgated pursuant to section 301 and 306.

Section 316(b) provides as follows:

> "(b) Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."

By its terms, section 316(b) is applicable to any "standard established pursuant to section 301 or section 306 of this Act and applicable to a point source." However, if any permit is issued to a thermal discharge prior to promulgation of any such standard, EPA (or the State, if it has permit issuance authority) must consider the language of section 402(a)(1), which provides that permits issued before promulgation of effluent standards shall contain "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." In my opinion, this language would authorize EPA or the State, in any permit issued before promulgation of thermal effluent standards, to impose conditions requiring cooling water intake structures to reflect the best technology available for minimizing adverse environmental impact.

§ § § § § § §

SCOPE OF PERMITTING AUTHORITY

TITLE: FWPCA, Section 306(d) - Ten Year Grace Period

DATE: September 5, 1973

QUESTION:

You have requested my opinion as to whether a point source whose construction began after October 1972, and which, though not required to do so by the FWPCA, nevertheless meets standards of performance published under section 306(b)(1)(B) entitled to the grace period provided in section 306(d). 1/

The answer is yes.

In order to qualify for the grace period, a point source must be constructed so as to meet all applicable "standards of performance."2/ The Administrator is required by section 306(b)(1)(B) to publish regulations establishing standards of performance for new sources within those categories included in the list published under section 306(b)(1)(A). New sources (i.e., those whose construction commences after publication of proposed regulations prescribing a standard of performance applicable to that source) are required to comply with these standards of performance and, assuming that they do so, are thus entitled to the grace period provided by section 306(d).

The use of the term "point source" and the reference to the date of enactment of the 1972 Amendments in section 306(d) suggests a Congressional intent to extend the grace period to sources beyond those which constitute "new sources". In my opinion, a point source is entitled to the benefit of section 306(d) if:

1/ Section 306(d) provides as follows:

"(d) Notwithstanding any other provision of this Act, any point source the construction of which is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facilitiy for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first."

2/ Standards of performance are defined in section 306(a) as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through the application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants."

(1) its construction was commenced after October 18, 1972, and

(2) it is within a category of point sources for which standards of performance have been published pursuant to section 306(b)(1)(B) and would thus have constituted a "new source" had its constuction begun after the fate of publication of the standards, and

(3) it is so constructed as to meet the applicable standard of performance.

§ § § § § § §

TITLE: Applicability of Permit Program to Storm Sewers

DATE: January 23, 1973

QUESTION:

Mr. Auerbach has asked me to give you an opinion on two questions:

1. Are storm sewers covered by the FWPCA?

2. If so, does the Administrator have discretion to exclude them from the permit program under section 402?

ANSWER

Storm sewers are "point sources" and as such are subject to the regulatory provision of the FWPCA, including the permit program. However, the Act may be read to confer on the Administrator some discretion to exclude categories of point sources from the federal permit program, and to authorize such exclusion from approved State permit programs, provided that there is a reasonable basis for the exclusion. The exclusion would have to be done by a change in the proposed federal permit program regulations, with a corresponding amendment to the final regulations governing State permit programs.

DISCUSSION

1. Section 301 of the FWPCA provides that "[e]xcept as in compliance with this section and sections * * * 402 * * * of this Act, the discharge of any pollutant by any person shall be unlawful." (Emphasis added.) Section 402 provides that "the Administrator may * * * issue a permit for the discharge of any pollutant* * *." (Emphasis added.) The term "discharge of a pollutant" is defined as including "any addition of any pollutant to navigable waters from any point source." (section 502(12)). The definition of point source is clearly broad enough to cover storm sewers (section 502(14)):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit* * *from which pollutants are or may be discharged.

Accordingly, both section 301 (which requires "best practicable" treatment by 1977) and section 402 (which establishes the permit program) apply to storm sewers.

DISCUSSION:

2. Section 402 does not explicity require the Administrator to issue permits to all categories of point sources; instead, it provies that the Administrator "may" issue permits for discharges from point sources. Moreover, section 301 does not provide that all point source discharges without a permit are unlawful; instead, it provides that "except as in compliance with" section 402, point source discharges are unlawful. These sections can be read together to allow the Administrator discretion to exclude categories of point sources from the permit program, and to provide that where such discretion has been exercised, a discharger need not obtain a permit to escape the prohibition of section 301.

This reading of the Act has been adopted in the proposed regulations governing the federal permit program, published January 11, 1973. Section 125.11(a) of these regulations provides: "All discharges of pollutants* * *from all point sources* * *are unlawful and subject to the penalties provided by the Act, unless the discharger has a permit or is specifically relieved by law or regulation of the obligation of having a permit." (Emphasis added.) Presently, there is nothing in the proposed federal permit program regulations or any other regulation to exempt storm sewers from the obligation of obtaining a permit. Accordingly, if EPA decides that such an exemption is desirable as a matter of policy, the proposed federal permit program regulations will have to be appropriately amended. It would also be necessary to change the final guidelines for State permit programs published December 22, 1972, which presently provide that the State must, with exception, prohibit all unpermitted point source discharges (section 124.10).

I would like to emphasize the necessity, if we do exclude storm sewers from the permit program by regulation, publishing in the Federal Register a full and persuasive explanation of why this step is being taken. There are two reasons for such an explanation. First, the reading of the Act which allows the Administrator discretion to exclude categories of point sources from the permit program may be challenged; and we will be in a better position to withstand the challenge if the court is convinced that the step is reasonable. Second, even after a court has ruled that we have discretion under the law to make such an exclusion, it will undoubtedly hold that this discretion must be exercised in a responsible way and that the reasonableness of any particular exclusion is subject to review by the court. Under recent judicial decisions, an agency cannot wait until it is sued before providing an explanation for its regulatory actions: it must provide the explanation when the action is taken.

§ § § § § § §

TITLE: Authority to Exclude Point Sources from the Permit Program

DATE: August 3, 1973

Mr. J. G. Speth
Natural Resources Defense
Council, Inc.
1710 N Sreet, N. W.
Washington, D. C. 20036

Dear Gus:

This is in response to your inquiry of May 30, concerning whether or not the Administrator has authority to exclude point sources from the permit program.

I have carefully considered the points which you raised in your letter. I do not understand your comments to constitute objections to our actions in excluding certain types of agricultural point sources from the permit program. Instead, you disagree with the legal basis for our action; you would prefer to reach the same result on a different legal basis, through a redefinition of the term "point source." Thus, it would appear that our legal dispute is somewhat academic, since it concerns reasoning rather than result. Nevertheless, we shall address the basic legal points raised by the agricultural exclusions.

Two legal issues are involved: first, are farm discharges "point sources"; and second, may the Administrator nevertheless exclude certain categories of point sources from the permit program?

As to the first question, there is little doubt that conveyances meeting the definitional requirements of §502(14) are point sources, whether such conveyances appear on farms or elsewhere. Accordingly, it is not legally tenable to treat farm discharges as nonpoint sources. Section 502(14) defines point source to include "any discernible, confined and discrete conveyance, including***any pipe, ditch, channel, tunnel, conduit, well, discrete fissure***." There is nothing in the language or the legislative history of the Act to indicate that pipes, ditches, etc., which occur on farms are impliedly excluded. Indeed such legislative history as there is indicates that they are included. An amendment that would have excluded irrigation return flows from the definition of "pollutant" was defeated on the floor of the House. cong. Rec., daily ed., March 29, 1972, at H2735. To be sure, sections 208(b)(2)(F) and 304(e) indicate that Congress thought that some agricultural runoff would not be a point source. 1/ However, these sections cannot be read to mean that pipes, ditches, etc., are not point sources when they occur on farms.

1/ Section 208(b)(2)(F) requires areawide waste treatment management plans to include "a process to (i) identify* * *agriculturally and silviculturally related nonpoint sources of pollution, including runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (includng land use requirements) to control to the extent feasible such sources."

Section 304(e) requires the Administrator to issue information regarding control methods for "agricultural and silvicultural activities, including runoff from fields and crop and forest lands."

Even though farm discharges (including discharges from any "concentrated animal feeding operation," which is by definition a point source (§502(14)) may in many cases be point sources, the FWPCA clearly provides the Administrator with some discretion to exclude categories of such sources from the permit requirements of §402.

In the first place, the Federal Water Pollution Control Act Amendments of 1972 made a number of significant alterations in the permit program originally carried out under the Refuse Act (33 U.S.C. §407). Among the most important of these was that, whereas the latter statute contained an absolute ban on any discharge without a permit, the FWPCA was cast in discretionary terms. Section 402(a)(1) provides that the Administrator "may" issue a permit; it does not require him to issue permits to all point sources. Section 301(a) provides that discharges from any point sources are unlawful "except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404." The reference to section 402 clearly means that where the Administrator stands ready to entertain an application from a point source, that point source must obtain a permit. But if EPA regulations provide that the Administrator will not entertain applications from certain agricultural dischargers, it could hardly be argued that such dischargers would be in violation of section 402.

It is also clear from the legislative history of the FWPCA that Congress did not intend for the Administrator to be rigid in the application of the permit program to all point sources. For example, even though marine engines might be point sources under many circumstances, the Chairman of the Conference Committee on the Federal Water Pollution Control Act Amendments of 1972 stated for the record that the Committee "would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines." Cong. Rec., Oct. 10, 1972 at E8454. The bill's chief sponsor in the Senate, Senator Muskie, indicated that the Administrator would by regulation distinguish between point and nonpoint sources in the agricultural pollution area:

> Guidance with respect to the identification of "point sources" and "nonpoint sources", especially as related to agriculture, will be provided in regulations and guidelines of the Administrator. The present policy with respect to the identification of agricultural point sources is generally as follows:
>
> . . . Natural runoff from confined livestock and poultry operations are not considered a "point source" unless the following concentrations of animals are excluded: 1000 beef cattle; 700 dairy cows; 290,000 broiler chickens; 180,000 laying hens; 55,000 turkeys; 4,500 slaughter hogs; 35,000 feeder pigs; 12,000 sheep or lambs; 145,000 ducks.

Although we do not believe, as Senator Muskie implies, that the Administrator may alter the statutory definition of "point source," these statements clearly indicate congressional awareness that there must exist some discretion to treat certain categories of sources as not subject to the permit program, even though such sources are clearly "point sources" within the meaning of §502(14).

To be sure, there is a limit on EPA's discretion to exclude categories of point sources from the permit program. The overall intent of the Act was that the permit program would be the principal means of enforcement; and if administrative exclusions reached the point of undermining this intent, they might be struck down. However, an administrative exclusion of farm point sources (other than feedlots) would, we believe, be sustained by the courts where the pollution problem is minor in relation to the administrative programs involved, or where the permit program would be an ineffective mechanism for controlling a particular category of sources.

§ § § § § § §

TITLE: Comparability of Public Participation and Information Procedures in Permit Program and Under NEPA

DATE: February 14, 1972

This is in response to your request for a comparision of the NEPA environmental impact statement procedures with procedures that are now or may be adopted under the permit program concerning public participation and information. I conclude that, considering permit program procedures and objectives, use of the environmental impact statement procedure in considering permit applications would be duplicative in some respects and superfluous in others.

1. The requirement of producing environmental impact statement serves three broad purposes. First, the impact statement procedure informs the public that a particular agency in contemplating a step that will significantly affect the environment, permits the public to present views and comment thereon (at a hearing in the agency's discretion), and, finally, requires the agency in the final statement to articulate how its decision has been affected by environmental considerations.

These functions of public information and participation are already provided by the permit program procedures. Extensive and detailed public notice of permit applications is required by 33 CFR 209.131(i)(4) and (j)(1). Public comment is invited in section 209.131(j)(?), which indeed requires that material submitted by the public be considered in determining whether the permit should be issued. Subsections (i)(6) and (k) provide for public hearings in the discretion of the Corps when there is "substantial public interest" in the application. This is either the same or a more liberal provision for the holding of hearings than that imposed by section 2(b) of Executive Order 11514, implementing NEPA. Indeed, section 402(a)(1) of S. 2770 as passed by the Senate would seem to require the Administrator to hold public hearings on permit applications where requested by interested parties; this would certainly amount to a more generous admininstrative hearing requirement than exists under NEPA. Finally, section 209.131(d)(7)(i-vii) requires the EPA regional representative to provide a full description of his recommendation to the Corps as to whether, and on what terms, a permit should be granted, and also requires a statement of "the basis for that recommendation." Thus the permit program regulations also require a written decision and explanation thereof, similarly to the requirement of a final environmental impact statement. Moreover, the permit program personnel advise that they intend to make improvement as to the effectiveness of public notice and the ability of the public to affect the decision-making process, by regulation after enactment of the new legislation.

In sum, the permit program procedures are either equal or superior to those surrounding the production of environmental impact statement with respect to public notice and involvement in the decision-making process.

2. A second function of the environmental impact statement procedure is to provide the agency producing the statement with the comments on federal agencies expert in environmental matters. Section 102(2)(c) NEPA. It need hardly be mentioned that this is unnecessary--or, indeed, illogical--where the agency making the decision is EPA.

3. The third function of the environmental impact statement procedure is to force agencies to show that they have complied with the general requirements of NEPA to consider environmental matters in making decisions. In this connection, Senator Jackson referred to section 102(2)(c) as "action-forcing." See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2nd 1109, 1112-1113 (C.A.D.C.). I think there is little question that the permit program procedures do not require for decisions on individual permits the breadth and depth of consideration of environmental factors that NEPA requires to be reflected in an environmental impact statement. The real question here, then, is whether the complete NEPA decision-making process must be gone through whenever a permit application is considered. If it must, then there is little reason for EPA to refuse to commit to paper an impact statement describing it. However if, as I believe, the full-scale NEPA decisionmaking process is inappropriate when making decisions on permit applications, then to require environmental impact statements to accompany permit decisions would mean at least the waste of vast amounts of EPA's resources.

Permit applications generally present issues of water quality alone. Moreover, in such cases, the permit terms should reflect application to the individual case of general standards for the protection of water quality (and, if the new legislation authorizes effluent standards, the task of deriving the specific permit terms will be simpler). The permit program procedures are entirely adequate to provide public notice, a chance to participate, and a final decision adequate for judicial review of this process.

The root problem here is the assertion -- made by members of the public seeking broadly to influence the construction and operation of industrial plants, and seemingly accepted by the district court in Kalur & Large v. Resor, 3 ERC 1458, 1466-1467 -- that the full-scale NEPA processes are necessary to determining permit applications because each such application requires not only the comparatively simple application of set standards for water quality but also the complex balancing process described by the D.C. Circuit in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (C.A.D.C.).

I believe this line of reasoning to be seriously in error. Basically, the court of appeals' reasoning in Calvert Cliffs was that in licensing a nuclear powerplant, NEPA required the AEC to go beyond the question of whether the proposed plant would meet applicable water quality standards (as the state had certified it would) to the greater issue of whether, taking into account all of the effects on the environment that the proposed plant would have, the AEC might want to impose stricter pollution control requirements or perhaps might decide not to license the project at all. The heart of the court's opinion on this score--typically, an overwhelmingly important problem disposed of in a brief, elliptical discussion--is contained in a few sentences (449 F.2d at 1113):

> The sort of consideration of environmental values which NEPA compels is clarified in section 102(2)(A) and (B). In general, all agencies must use a systematic, interdisciplinary approach" to environmental planning and evaluation "in decisionmaking which may have an impact on man's environment." In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." "Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.

The court goes on to point out that NEPA requires environmental impact statements "to ensure that the balancing analysis is carried out and given full effect* * *." Id at 1114.

The court held, then, that AEC had to balance environmental matters against "economic and technical considerations" in determining whether, and on what terms, to license a nuclear project. What this balancing analysis actually comprehends the court makes somewhat clearer further on, in explaining why it is not sufficient for the AEC to rely on the state's section 21(b) certification (449 F.2d at 1123):

> It may be that the environmental costs [of the project], through passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action--the agency to which EPA is specifically directed.

In my view, this sort of balancing is utterly out of place in the permit program. The court of appeals' reasoning that the AEC is in the position to weigh the "economic and technical benefits" flowing from a nuclear plant may be accepted, since that is the AEC's task, but it is quite a large leap to say that EPA or the Corps of Engineers is able--or was intended by Congress -- to assess the "economic and technical benefits" of all of the establishments that discharge into the navigable waters, and to balance those benefits against environmental costs as part of the process of determining whether, and on what terms, to issue a discharge permit. It is inconceivable to me that to qualify for a discharge permit an applicant whose proposed discharge would comply with applicable standards should nonetheless have also to demonstrate to EPA or the Corps that his plant produces materials of sufficient benefit to society to justify permitting that discharge. That Congress could not have intended to centralize such vast industrial and land-use planning powers in a federal agency, is the crux of our argument that NEPA does not apply to the regulatory activities of EPA and other federal agencies concerned with the environment.

If this position is correct, and if EPA is not required to carry out the balancing exercise described in Calvert Cliffs, then there is no reason to require EPA to produce section 102(2)(C) statements as a part of the permit process.

§ § § § § § §

TITLE: Confidentiality of Effluent Data

DATE: September 27, 1973

It has come to my attention that certain permit proceedings have taken place in the absence of public disclosure of effluent data contained in applications under the old Refuse Act Permit Program. "Effluent data" as used herein means that information relating to the quantity and quality of effluent being or anticipated to be discharged by an applicant. The data are reported in the following places on the Refuse Act Permit Application:

Section I - 14, 15, 24, 26
Section II - 17, 18, 19, 20, 22(3) (4) (5),
23, 25 (depending on contents)
Section II - Part A (3) (5) (6) (7)
Section II - Part B
B-1 (3) (4) (5)
B-2 (3) (5) (6) (7)
B-3 (3) (5)

Section 308 of the FWPCA provides, in effect, that information submitted to the Administrator in connection with his implementation of section 402 of the Act shall be available to the public, save to the extent such disclosure would "divulge methods or processes entitled to protection as trade secrets of such person. . .," but that "effluent data" are never eligible for confidentiality. Section 308 was not, of course, in effect with respect to applications submitted under the RAPP Program, and it might be argued that they are therefore not now subject to the liberalized disclosure provisions of section 308. On the other hand, section 402(a)(5) of FWPCA provides that any RAPP application pending on the date of enactment of P.L. 92-500 "shall be deemed to be an application for a permit under this section."

I therefore conclude that the provisions of section 308 are indeed applicable to the RAPP applications by virtue of section 402 (a)(5) and, as a result, that effluent data contained in such applications can never qualify for confidential treatment.

It should be unnecessary to state that a hearing on a permit application becomes a matter of hollow procedural formality if the data concerning the composition of the effluent involved are not available to the public. It should also be noted that it would have been fully within the Agency's powers to require RAPP applicants to resubmit current effluent data under section 308; had it done so, there would of course be no doubt that the effluent data in question were ineligible for withholding from the public on grounds of trade secrecy or otherwise. I therefore consider it extremely unlikely that any court would hold that, as a precondition to invoking the clear policy of section 308, the Agency would have to indulge in largely redundant data collection on such a massive scale.

Therefore, in no case should confidential treatment be accorded to effluent data in the NPDES program, whether that data are contained in a RAPP application or in an application on an NPDES form, or otherwise.

§ § § § § § §

WATER QUALITY STANDARDS

TITLE: Disapproval of Overly Stringent State Standards

DATE: August 2, 1973

QUESTION:

Can EPA promulgate water quality standards for a state which are less ressrictive than the state standards which call for a "no discharge" policy?

ANSWER:

Yes. However, the state may adopt and enforce more stringent standards, and EPA must apply such standards in issuing permits under section 402 of the FWPCA.

DISCUSSION:

For the purposes of this discussion, I assume that you are referring to standards which have been adopted by the state and submitted to EPA pursuant to section 303(a) of the FWPCA. The Administrator is required to determine whether or not such standards are consistent with "the applicable requirements of [the FWPCA] as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972." The requirements of the old law are set forth in section 10(c)(3) of the old FWPCA. The basic requirement is that "standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this act."

In determining whether or not the standards submitted by Missouri meet the requirements of the FWPCA, two question must be answered. First, is a prohibition of the discharge of pollutantts into a body of water a "water quality standard" under section 10(c) of the old law, and if so, is such a "zero discharge" requirement necessary to comply with the requirements of section 10(c)(3).

As to the first question, it seems clear that what the state of Missouri proposes to establish is an effluent standard, and not a water quality standard. Under the old FWPCA, water quality standards included water quality criteria and a plan of implementation and enforcement of such criteria. While the term "criteria" is nowhere defined, it seems clear that it does not include effluent standards, but applies only to the quality of receiving waters. This may be inferred from section 10(c)(5), which provides abatement procedures for "the discharge of matter into....interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection...." Since the proposed Missouri standard appears to be an effluent standard, rather than a water quality standard, it would not be approvable under the FWPCA. Your letter does not indicate that the State's "no discharge" policy is a plan of implementation and enforcement to achieve specified criteria. Such a case would pose different problems.

Assuming, for the purposes of discussion, that the standards submitted by the State of Missouri are water quality standards, and not effluent standards, EPA would still retain the authority to disapprove them on the grounds that the state standards were more stringent than required to meet the tests set forth in section 10(c)(3) of the old law, and to promulgate standards under section 303(b) of the new law. It should be recognized that any such disapproval by the Administrator would not preclude the state from enforcing its standards within the state under its own law (see section 510) or from enforcing its standards against any federal agency (see section 313). Moreover, section 301(b)(1)(C) would require the Administrator or a State to require compliance with any such requirement, enforceable under State law, in an NPDES permit issued under §402 of the Act. However, even if the Missouri submission were a "water quality standard", disapproval would be warranted if we determined the standard to be more stringent than the law requires. Our approval of an overly restrictive standards would unnecessarily subject us to judicial challenge on grounds that our action was arbitrary and capricious.

§ § § § § § §

TITLE: Issuance of Discharge Permits Based upon Proposed Water Quality Standards

DATE: May 31, 1973

QUESTION

Will the FWPCAA of 1972 support the issuance of discharge permits based upon proposed standards published for a State by EPA in the Federal Register?

ANSWER

No.

DISCUSSION

Section 301(b)(1)(C) of the Federal Water Pollution Control Act requires the achievement by July 1, 1977, of effluent limitations necessary to meet "water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations. . .or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant of this Act." The applicability of any of the enumerated requirements depends upon whether it has been "established" pursuant to State or Federal law.

Your question is limited to the case where standards are proposed by EPA pursuant to §303(b). The statute clearly sets forth in that subsection a procedure whereby standards are "proposed" by EPA, and, unless a State adopts approvable standards, the proposed EPA standards are "promulgated" within 190 days. Until such time as the standards are "promulgated," EPA would not be authorized to apply them.

However, it should be pointed out that nothing in the statute requires the Administrator to wait the full 190 days before promulgation. State-adopted standards must be considered only if adopted prior to promulgation by EPA. Accordingly, in any case where it is considered urgent that the proposed standards be applied in the permit issuance process, I suggest that a notice be promptly prepared promulgating the proposed standards.

§ § § § § § §

TITLE: Objections of a Downstream State Under §401(a)

DATE: March 29, 1973

QUESTION

Under section 401(a) of the FWPCA, may a downstream state object to issuance of a discharge permit on the basis of violation of laws or regulations of such state which are not directly related to instream water quality?

ANSWER

No. Under section 401(a), the downstream's state's objections are limited to violations of water quality requirements.

DISCUSSION

Section 401(a)(2) of the FWPCA requires the Administrator to notify a downstream state whenever he determines that the issuance of a Federal license or permit would "affect. . .the quality of the waters of" such state. The affected state may within sixty days notify the Administrator and the licensing or permitting agency of its objections if it "determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such state." The Federal licensing or permitting agency must then condition any license or permit granted "in such a manner as may be necessary to insure compliance with applicable water quality requirements," presumably those of the affected state.

The precise question involved here is whether a downstream State may raise objections to a proposed discharge under §401 not related to water quality, such as implementation plan requirements under water quality standards, and the like. Such a result would appear to be precluded by the statute, which accords a different degree of flexibility to affected downstream states than is accorded to certifying states. States in which a discharge originates may set forth in certifications "effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant. . .will comply with. . .any other appropriate requirement of state law. . . ." Under §401(d), these requirements are made conditions to the issuance of any Federal license or permit. Accordingly, states in which a discharge originates have a great deal of authority to include in certifications conditions relating to monitoring and effluent requirements, and any other appropriate requirements.

Downstream states, however, have considerably less flexibility. The situations in which a downstream state may object are limited to those in which a "discharge will affect the quality of its waters so as to violate any water quality requirement in such state. . . ." (Emphasis added). And while section 401 authorizes the state in which a discharge originates to require compliance with "any other appropriate requirement of state law," only the downstream State's "applicable water quality requirements" are recognized by section 401. Accordingly, section 401 cannot be read to authorize a downstream state to object to permit issuance on the basis of implementation plan requirements, or similar non-water quality requirements.

§ § § § § § §

TITLE: Enforcement of Water Quality Standards

DATE: November 20, 1972

QUESTION

Are water quality standards enforceable under the 1972 Amendments to the FWPCA, and if so, by what mechanism?

ANSWER

The issuance of permits under section 402 will be the principal method for enforcing water quality standards. Standards will also be enforceable under section 309, by administrative or judicial order. However, if a discharger has filed a permit application, EPA may not proceed against him prior to December 31, 1974, for failure to comply with water quality standards until final administrative disposition of the application. In addition, municipalities have a 180-day grace period beginning on the date of enactment of the 1972 Amendments in order to file their permit application; and during this grace period, EPA may not take action against them for violation of water qualtiy standards.

DISCUSSION:

1. Section 301(b)(1)(C) of the FWPCA provides that every discharger shall achieve, no later than July 1, 1977, "any more stringent limitation, including those* * *required to implement any applicable water quality standards established pursuant to this Act." Violations of section 301(b)(1)(C) are enforceable under section 309, which establishes a system of federal enforcement. This interpretation is confirmed by the Report on the House Committee on Public Works, which stated:

> "The requirements of section 303 which provide for water quality standards and implementation plans may be enforced under the provisions of section 309 because section 303 is operative under section 301(b)(1)(C)."

(House Report No. 92-911, 92nd Cong., 2nd Sess. at p. 115.)

2. Section 309 provides for both administrative and judicial enforcement. Whenever the Administrator finds that any person is in violation of specified sections of the Act -- including a violation of water quality standards -- he may either issue an administrative order requiring compliance, or he may bring a civil action for injunctive relief in the Federal courts. there is also a provision for notifying the states of the administrative finding of a violation. When a discharger "willfully or negligently" violates specified sections of the Act -- including violations of water quality standards -- he is subject to a possible fine and imprisonment. In addition, a civil penalty is prescribed for any violation, including violations of water quality standards.

EPA has not yet adopted regulations establishing its procedures for issuing administrative orders under section 309. Until regulations under section 309 are issued, I cannot be more specific as to the procedures to be used.

3. Any discharger which has filed a permit application, is exempt from enforcement under section 309 until December 31, 1974, so long as there has been no final administrative disposition of the application (unless final administrative disposition has not been made because of the applicant's failure to furnish informaton reasonably required to process the application). (Section 402(k)). In addition, municipalities and other dischargers which were not subject to the Refuse Act have 180 days from the passage of the 1972 Amendments to apply, during which grace period they also are not subject to enforcement under section 309 for violation of water quality standards.

4. The principal method of enforcing water quality standards will be through the permit system. Section 402(a)(1) provides that permits must be issued on condition that the discharge will meet all applicable requirements under section 301, among other sections; and section 301 includes the requirement of meeting water quality standards. Thus, the conditions of the permit must insure compliance with water quality standards. Once the permit is issued, section 402(k) provides that compliance with the permit shall be deemed compliance, for enforcement purposes, with section 301. Accordingly, once a permit is issued, the discharger may not be sued for violation of water quality standards, but would have to be sued for noncompliance with the terms of the permit.

§ § § § § § §

TITLE: Revision of Applicable Water Quality Standards

DATE: January 13, 1971

This confirms our earlier informal opinion that applicable water quality standards, including criteria and plans of implementation and enforcement, adopted pursuant to section 10(c) of the Federal Water Pollution Control Act (the Act) continue in exclusive effect until the Administrator of the Environmental Protection Agency determines that revised standards are consistent with section 10(c)(3).

Section 10 of the Act provides for a State-Federal process to establish standards for interstate waters which, upon Federal determination of consistency with the Act,

> ". . . shall thereafter be the water quality standards applicable to such interstate waters or portion thereof."

Now that standards of all the states have been approved in major part and the Water Quality Office (WQO) is working with the states to clear up the remaining exceptions, the question of revision of approved standards has come to the fore. A number of states have adopted changes in implementation plans, which present the potential threat of a confusing dual system of standards for interstate waters.

The argument is made that standards, and particularly implementation plans must be realistic and flexible. In certain instances financial and other constraints have made it impossible to meet the schedules originally set. In other cases, technological advances and increased levels of Federal and State funding may permimt tightening of the original schedules. Similarly, advances in technology and demands for clean water are expected to produce upgrading of water quality criteria. A number of questions which have arisen from this situation and our answers follow.

QUESTION

May standards be revised, in view of the language of section 10(c)(1) that standards adopted shall "thereafter be" the applicable standards?

ANSWER

Yes, it is clear from the overall context of section 10(c) that the standards originally adopted are to apply only until a revision has been accomplished pursuant to the Act. Section 10(c)(2) specifically provides for such revision through a procedure which envisions a standards-setting conference of all interested parties, Federal publication of standards in regulations and, finally, Federal promulgation of standards six months after publication, if the State has not adopted acceptable standards and if a petition for a formal public hearing pursuant to section 10(c)(4) has not been filed.

QUESTION

Is the section 10(c)(2) procedure the exclusive method for revision of standards?

ANSWER

No. A Solicitor's memorandum of June 20, 1968, advised the Commissioner, Federal Water Pollution Control Administration, that the Secretary may determine that state-adopted additions to or changes of standards validly meet the Federal criteria; that upon such determination the changed standards may be enforced to the same extent as the initially adopted standards; and that if, in accord with its legal requirements, a State conducts a public hearing before it adopts additions to or modifications of such standards, the requirement and purpose of a "10(c)(2) conference" has been satisfied. The opinion provides that, while the Act requires a public hearing prior to State adoption of standards, this requirement has been met by each State in its initial adoption of standards. Therefore, the memorandum suggests that State law, as interpretated by State legal offices, should be relied upon to indicate whether further public hearings are required when originally submitted standards are proposed to be changed. Finally, the opinion indicates that even minor adjustments in implementation schedules are not valid without formal revision of standards, including compliance with State administrative procedural requirements, Federal determination of consistency with the Act, and official publication.

We support these conclusions of the prior opinion. The entire tenor of the Act favors state action in the setting and enforcement of standards. Indeed, section 10(c)(2) provides for an exception to final Federal promulgation of standards where the state, during the 60-day period from publication, adopts water quality standards which are determined to be consistent with section 10(c)(3). Presumably at that point the Administrator is required to accept and publish the state adopted standards. This is a further indication that the section 10(c)(2) procedure was intended not as the exclusive way to revise standards, but as a means for Federal action in default of appropriate State action.

QUESTION

What is the status of revised standards adopted by a State prior to approval by the Administrator, EPA?

ANSWER:

Section 10 provides that the criteria and plan which the Administrator determines to be consistent with section 10(c)(3) are to be ". . . the water quality standards applicable to such interstate waters or portions thereof." (Emphasis supplied.), not the "Federal" or "Federal or State standards." The legislative intent to have one system of applicable standards for the interstate waters of a State is clear. certainly it is reasonable from an administrative standpoint to do so. The present doubts raised by state adoption of changes in implementation plans suggest the confusion which a dual system of standards would entail.

Therefore until revised standards are submitted by the State and determined by the Administrator of EPA to be consistent with the Act or, alternatively, until he promulgates new standards under section 10(c)(2), the initially approved criteria and plan are the only legal and enforceable standards applicable to the subject interstate waters of the State.

TITLE: Revision of Water Quality Standards

DATE: February 15, 1973

Mr. Sabock asked me to furnish you with an opinion on the following questions:

QUESTIONS:

Where a Regional Administrator has notified a State, under section 303(a)(1) of the FWPCA, of specified changes in water quality standards needed to meet the requirements of the Act as in effect prior to the 1972 Amendments, must the Administrator proceed to propose and promulgate the specified changes? Or does the Administrator have some discretion not to proceed at all, or to propose and promulgate different changes?

ANSWER:

Where the Administrator determines that the prior determination of the Regional Administrator was mistaken and that the State standard does conform to the FWPCA as in effect prior to the 1972 Amendments, the Administrator may elect not to proceed with proposal and promulgation of the changes previously specified by the Regional Administrator. However, the Administrator should have a supportable written statement to explain the changed determination.

If the Administrator determines that the changes specified by the Regional Administrator were more stringent than needed to meet the requirements of the Act as in effect prior to the 1972 Amendments, he may make appropriate changes in his publication of proposed regulations. Here also, there should be a supportable statement of reasons for the changed determination.

DISCUSSION:

Section 303(a)(1) of the FWPCA provides that existing state water quality standards for interstate waters shall remain in effect "unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972." Section 303(a)(1) goes on to provide that if the Administrator "makes such a determination," he shall notify the states by January 18, 1973, and "specify the changes needed to meet such requirements." The section further provides: "If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section." Subsection (b) provides that the Administrator "shall promptly prepare and publish proposed regulations setting forth water quality standards for a State" where a standard submitted by the State "is determined by the Administrator not to be consistent with the applicable requirements" of subsection (a). Finally, section 303(b)(2) provides that the Administrator "shall promulgate" any water quality standards which he has proposed, "unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a)."

On January 18, 1973, all the Regional Administrators except one, acting under a delegation of the Administrator's authority, sent out letters to most of their States specifying changes needed in the State's water quality standards needed to conform to the requirements of the old FWPCA. You have now inquired whether the Administrator is required to propose and promulgate these changes as federal regulations in each case where the State does not adopt the specified changes.

The language of section 303 is mandatory. Once the Administrator notifies the States of changes needed to meet the requirements of the old FWPCA section 303 provides that the Administrator "shall" propose and promulgate such changes if the State fails to do so. However, the entire process hinges on the initial determination under section 303 (a) (1) that the State water quality standard "is not consistent with the applicable requirements" of the old FWPCA, and that the changes specified are "needed to meet such requirements." There is a general doctrine of administrative law that an agency is free to change its mind -- at least for the period during which the agency's decision is not yet final or is still subject to judicial review. 1/ In this case, EPA's determination that various state standards are not adequate to meet the requirements of the old FWPCA is clearly not yet final and may still be subject to judicial review. Indeed, even after final promulgation of the standards, they are still subject to continuing review and revision, under section 303(c). 2/ In these circumstances, I would expect a court to hold the Administrator has continuing authority to change his mind regarding the adequacy of state standards and the need for specified changes.

However, because of the mandatory language of section 303, there is some legal risk here. For this reason, we should proceed with caution. If, in any case, there is a decision not to proceed with changes that have been specified by a Regional Administrator, we should have a written statement of reasons why we now think that the Regional Administrator was wrong. This will enable us, in the event of judicial challenge, to show the court that there was in fact a change of mind as to the correctness of the Regional Administrator's determination, and that the failure to proceed was not simply a political judgment.

1/ See International Harvester Co. v. Ruckelshaus, D.C. Cir. February 10, 1973, slip opinion at p. 26: "Indeed, the fact that the Administrator issued the Technical Appendix almost three months after his Decision, at a time when judicial review had already begun to rut its course, indicates that the Agency did not believe that agency consideration was frozen from the moment that the suspension decision was rendered, a view we approve. The EPA had latitude to continue further consideration* * *." See also Greater Boston Television Corp. v. FCC, 463 F.2d (D.C. Cir. 1971): "[S]o long as the time for appeal to the court has not expired the FCC has jurisdiction to provide reconsideration in its sound discretion."

2/ Revisions under section 303(c) are subject to a new set of statutory requirements, rather than the requirements of the old FWPCA. (Section 303(c)(2)). However, the new requirements repeat almost verbatim the requirements of the old FWPCA.

The same reasoning supports the conclusion that, if we believe that the Regional Administrator was correct in determining that the State standard was inadequate but conclude that the changes specified by the Regional Administrator were more stringent than necessary to meet the requirements of the law, the Administrator may propose and promulgate less stringent changes in the State standard. However, here also, we should have a written statement of reasons for the changed determination.

§ § § § § § §

DRINKING WATER STANDARDS

TITLE: Legal Review of Task Force Report

DATE: December 15, 1971

Pursuant to your request we have reviewed the 1971 revision of the drinking water standards prepared by the Technical Task Group of the Water Supply Programs Division. The attached memorandum by Mr. Miller of my office sets forth our comments in detail. Some of these comments are of a purely technical nature and I will not summarize them here. Others relate to substantial problems of statutory authority not only for the 1971 revisions of these standards but also for the present drinking water standards which were last revised in 1962 (42 CFR, Part 72, Subpart J).

The only specific statutory support for the standards is to be found in 42 U.S.C. 264 which authorizes regulations to be promulgated for the purpose of preventing the spread of "communicable disease." Notwithstanding this language, the drinking water standards have long included limits for substances which clearly have no relation to communicable disease (i.e., chemical, physical and radiological substances) and in some instances have no relation to any direct health hazard whatever (e.g., taste). In addition, both the present and revised versions of the drinking water standards contain requirements which appear unrelated to interstate movement of disease (which in the past has been attacked by requiring interstate carriers to use only water coming from certified water supply sources, see 42 CFR §§72.101, 72.102). Therefore, a significant portion of the standards are probably not enforceable under the 1971 revision since it is more ambitious in providing an overall set of standards to protect the maximum number of water users (see e.g., the sodium limit which is designed to set limits designed to prevent harm to those on extremely restricted salt diets). In addition, the standards for the first time forthrightly designate certain limits as relating only to esthetic considerations.

This state of affairs leads to two recommendations. First, legislative amendment should be sought as soon as possible to provide solid authority for drinking water standards regardless of whether the harmful effect is communicable or not and whether or not the water supply serves as a source for interstate carriers.

Secondly, although it is not legally impossible to promulgate standards which are partially unenforceable, the agency could perhaps be rightfully accused of being less than candid should it issue standards which purport to be a complete system of regulation. We are informed by Mr. William N. Long, Deputy Director, Water Supply Programs Division, that the inability to enforce chemical, physical and radiological standards is already publicly known. Therefore, there seems to be no reason not to include a brief introductory statement within the drinking water standards declaring that the bacteriological limits are mandatory in order to secure a certification of a water supply pursuant to 42 CFR §72.102, but that chemical, physical and radiological limits are recommended to be followed in order to achieve satisfactory water treatment. This statement could also point out that failure to achieve water quality meeting the chemical, physical and radiological limits may be evidence of poor treatment practices which could lead to the presence of bacteriological matter in violation of the bacteriological limits. Further investigation procedures of EPA might then be required. A draft of the statement is contained in Mr. Miller's memorandum.

Such a statement would make the application of the regulation clear with respect to non-bacteriological limits, and in addition it would directly key in the drinking water standards to section 72.102 of the regulations which makes the whole regluatory system applicable only to interstate carriers.

An additional problem is raised in the 1971 revision of the standards insofar as a specific category of limits is created for esthetic considerations (i.e., those relating to taste, smell or color but not constituting a health hazard). I agree with the suggestion in Mr. Miller's memorandum that it would be preferable (even should a broader statute be enacted) to include in sections of the standards dealing with esthetic limits some justification of these limits on the grounds of an indirect health effect. In the past this has been stated in terms of a likelihood that a system exceeding esthetic limits may well also be excluded esthetic limits may well also be exceeding health related limits and further that water users who find the water aesthetically displeasing will often turn to an alternative supply which may be even less safe (see 1962 Standards, Appendix pp. 21-22).

§ § § § § § §

TITLE: Legal Review of Task Force Report--Drinking Water Standards

DATE: December 15, 1971

The statutory basis for regulation by EPA, formerly by the Public Health Service, of drinking water quality is set forth in 42 U.S.C. §§216(b) and 264(a):

> "[§216](b) The Surgeon General, with the approval of the Secretary, unless specifically otherwise provided, shall promulgate all other regulations necessary to the administration of the Service, including regulations with respect to uniforms for employees, and regulations with respect to the custody, use, and preservation of the records, papers, and property of the Service."

> "[§264](a) The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other state or possession."***(emphasis added).

Section 204 is derived from the Federal Quarantine Act of 1893 which was included in a 1944 recodification of public health laws. No substantive change was intended (§361, 58 Stat. 703, 1944 U.S. Code Cong. Service 1211, 1234-35). Both statutes unfortunately limit the regulatory authority to prevention of "communicable disease" from being introduced into or spreading between States or from a foreign country into a State. 1/

Drinking water standards were promulgated by the Surgeon General as long ago as 1914, and standards published in the Federal Register in 1942 included chemical and physical limits as well as bacteriological standards. The present standards, promulgated in 1962, included radiological limits for the first time. They are implemented by three other provisions of Part 72, Title 42, CFR.

Section 72(1) defines "potable water" as water meeting standards prescribed by Subpart J of part 72 (Drinking Water Standards). Section 72.101 provides that only potable water shall be provided for drinking water by any operator of any conveyance engaged in interstate traffic and that such water shall be obtained from "watering points" approved by the Surgeon General. 2/ Section 72.102 then states that the Surgeon General shall approve a watering point if the water supply meets Drinking Water Standards (Subpart J).

When the present, and past, drinking standards are set against the statutory background described above, three areas of regulation appear unsupported by statutory authority:

1. Standards relating to chemical, physical, and radiological substances which are harmful to health but which do not lead to "communicable disease";

2. Standards relating to "esthetic" factors that pose no health hazard as such; and

3. Standards and regulatory requirements unrelated to control of the quality of drinking water supplied to interstate carriers but aimed at protecting the local populace.

I am informed by Mr. William Long, Deputy Director, Water Supply Programs Division, that work is underway with respect to an overall legislative program relating to drinking water which would correct the present gaps in statutory authority. This is clearly necessary since even though the Technical Task Force revision of the Standards deals with the statutory voids rather successfully, EPA will nevertheless be promulgating standards which are in large part unenforceable until a legislative change is made. I have also learned from Mr. Long that the unenforceability of present drinking water standards as to chemical, physical and radiological standards is a matter of public knowledge.

1/ The 1893 statute spoke in terms of preventing the introduction of "contagious or infectious diseases" 27 Stat. L. 450, ch. 114; 42 U.S.C. 92.

2/ All functions of the Surgeon General were transferred to the Secretary of HEW by Reorganization Plan No. 3, 80 Stat. 1210, 31 F.R. 8855. 1970 Reorganization Plan No. 3, Sec. 2(a)(3)(ii)(B) then transferred these functions, insofar as they relate to drinking water (the Bureau of Water Hygiene in HEW) to the Environmental Protection Agency.

Assuming we are presently stuck with an inadequate statutory scheme, I have made certain suggestions in the technical comments set forth below which are intended to strengthen the standards from a statutory point of view. In addition to these suggestions, I would recommend including the following new Section 1 in the standards:

> 1. Application of Standards
>
> The drinking water standards contained in this Subpart J are divided into three groups dealing respectively with (i) bacteriological quality, (ii) chemical and physical quality and (iii) radiological quality. Requirements as to bacteriological requirements (section 5.1) must be satisfied in order to secure approval of the Environmental Protection Agency of a watering point under section 72.102 of this Part 72, Title 42, Code of Federal Regulations. Requirements as to chemical and physical quality (section 5.2) and radiological quality (section 5.3) are recommended to be followed in order to achieve satisfactory water treatment. Failure to achieve the maximum allowable limits contained in sections 5.2 and 5.3, however, may be evidence of inadequate treatment practices which could lead to violations of section 5.1 sampling requirements and limits. Further investigations of the adequacy of water treatment methods and processes could be necessary.

This statement would more clearly limit the scope of the regulations to that of their statutory base by making only the bacteriological limits mandatory and by keying the entire set of standards into the regulation of interstate carriers provided for by 42 CFR §§72.101 and 102. In addition, it avoids making the esthetic limits exceed the bounds of the statute since these limits are contained exclusively within the chemical and physical section. Should the statute be amended to cover harmful non-bacteriological substances, however, the esthetic limit will have to be justified, hopefully by an indirect link to human health. A suggestion along those limits is included below in discussing section 11.72 of the draft standards.

Drafting Comments

§1.72--"Maximum allowable limit (esthetics)"

As noted above, the present revision of the standards, for the first time, explicitly includes esthetic considerations as a relevant factor in setting the standards. Such considerations were already inherent in the 1962 standards (see §§4.2 and 5.2). However, the inclusion of the term "Maximum allowable limit (esthetics)" within the definition section makes the distinction much more obvious. In addition, esthetic considerations are separately treated in the limits section of the standards. I believe the standards would have a stronger statutory base if reference is made wherever possible to the connection between esthetic factors and the likelihood that the water supply system is not being managed properly and the consequent possibility that health related hazards are also present in esthetically displeasing water.

Also, esthetic consideration could be supported by the mention of the historical experience that once water reaches a certain point of esthetic unpleasantness the consumer turns to other sources of supply which may be less safe. I would, therefore, suggest the following two additional sentences be added to §1.72:

> "The presence of esthetically inferior water in a water supply system or water source may indicate the presence of substances which are hazardous to human health. Moreover, experience has shown that if water becomes inferior many people will turn to alternative water supplies or sources that may be less safe rather than accept and use esthetically inferior water."

The same statement should then be added to §§4.231 (sampling for chemical and physical characteristics) and 5.213 (explaining the basis of esthetic limits as applied to chemical and physical substances).

§1.8 -- "Pollution"

This section presently includes at the end of the sentence the words "or impair the usefulness of the water." This seems to suggest an economic consideration which would be beyond the bounds of considerations bearing upon "communicable disease". Therefore, I believe the standards would be more easily defended if they are drawn somewhat more narrowly and the words following "unnecessary risk" were deleted.

§1.9 -- "Public Notification"

This section is one of those which raises the question of the statutory authority to require an affirmative act on the part of the water supplier for noncompliance with standards unrelated to communicable disease. It also seems to require acts not necessarily related to regulating interstate carriers. To a large extent the inclusion of this section is a matter of administrative policy which is beyond the scope of this memorandum. However, I am not sure how much it really adds to the notification requirements included in the body of the bacteriological, chemical and radiological limits. If it does not serve a specific needed purpose, I would be inclined to delete it altogether on the theory that we should not stir up objections to the scope of the regulations if not absolutely necessary.

§2.2(d) -- General classes of water sources (waste water)

Mr. Long states that the intention of this subsection is to indicate that the standards are not designed to set safe limits for sewage treatment effluent water. This water source is regarded as unique, and there are apparently still many unknowns with respect to insuring the safe use of such water for drinking water purposes. I believe the intention can be made clearer if the regulation can be redrafted as follows:

> "(d) Waste water--these standards are not designed to apply, and may not be satisfied, when waste water effluents are used as a raw water source."

§4.22 -- Failure to meet sampling limits

The last sentence of section 4.22 states that if the sampling limits are not met during six consecutive months this fact must be made known to the consumer. Since the number of samples required by §4.22 is expressed in terms of a given percent or number per quarter rather than per month, I would suggest amending the last sentence as follows:

> "Failure to meet these sampling limits two (2) consecutive quarters must be made known to the consumer."

§5.212 -- Basis of maximum allowable limits (health)

The statement contained in this section indicates that chemical and physical quality limits have been set from the broad point of view of habitual exposure ("the total environmental exposure of man") which seems to suggest that the limits have been set not with a view to transient use of water by interstate carrier but rather to protect local users of the water supply subject to the standards. I recognize, however, that the standards would be virtually meaningless if the limits were to be set at acutely toxic levels. I think they can be defended as presently drawn on the ground many water users are in fact habitually transient users, and therefore the limits must be set from the point of view of cumulative exposure even from the point of view of providing protection to interstate carriers. Secondly, should an introductory statement with respect to the non-enforceability of chemical and physical limits be included in the standards. §5.212 will clearly not be attempting to regulate without authority.

§5.215 -- Necessary action

This section represents an improvement over the 1962 standards with respect to chemical and physical limits. Those standards spoke in terms of "rejecting" water supply whereas, in view of the absence of statutory authority, the present draft requires prompt evaluation by the "appropriate authority", in the event that chemical and physical quality limits are exceeded. I assume "appropriate authority" is intended to refer to the local water supply authority. However, the term is not defined either in §5.215 or the definition section (§1). To avoid confusion I believe some definition should be included in one of these two places.

§§5.226, 5.227, 5.2210, 5.2211, 5.2213, 5.2216, 5.2222 and 5.2224 -- Esthetic limits

As discussed above, the problem of lack of statutory authority to set esthetic limits, can be lessened by inclusion of the recommended explanatory language in §§1.72, 4.231 and 5.213. If those sections are modified to more explicitly establish relationship between esthetic limits and indirectly related health hazards, the esthetic-related chemical and physical limits do not require much further comment. However, I think these particular limits could also be reviewed to see whether the health hazard concept could be worked into some of the language of those limits. Statements might be eliminated which confess that there is no direct connection between the esthetic limits and the safety of the water. For example, the first sentence of §5.226 relating to color states:

> "Although the intensity of color does not directly measure the safety of the water, it is related to consumer acceptance of the water."

This sentence could be redrafted as follows:

> "The intensity of color provides an indirect measure of safety of the water and the water supply system because it is related to consumer acceptance of the water and the overall treatment provided by the water supply system."

Similarly, looking at the copper limit (§5.227), the fourth sentence of that section might be amended to delete the phrase "rather than a health hazard" so that the sentence would simply state:

> "This limit, however, is based on undesirable taste."

Another example would be the iron limit (§5.2211) which presently states that the amount of iron permitted in water by the limit "does not have toxicologic significance."

§§5.2217, 5.220 -- Explanations of bases for each limit

These two sections of the chemical and physical limits, like all the others set forth a brief explanation of the reason each limit has been included and how the particular limit figure was derived. These explanations are brief versions of the sort of explanations that have been previously confined to an appendix to the drinking water standards. I will not attempt to make a determination as to whether any explanation for the limit should be contained in the regulations or not. However, if this is to be done, I believe statements expressing doubt as to validity of a particular limit figure should be minimized in order to avoid unnecessarily facilitating an attack upon the validity of the regulation. Of course, here once again, this concern is made more or less important according to whether the chemical-physical limits are presented as enforceable mandates or simply as recommendations to water supply operators and regulators.

An example of the problem is contained in §5.2217 (Organics-Carbon Adsorbable) which states that "although the toxicological nature of these materials has not been precisely defined to date, and the analytical technique is not the most desirable, these materials should be limited to the lowest attainable level." The same problem arises in §5.2220 (Silver) which states that the "amounts of colloidal silver required to produce this condition (argyria, argyrosis), and which would serve as a basis for determining the water standard is not known. . .."

While these statements are perfectly proper, perhaps they should be contained in an appendix rather than the standard itself since the appendix can usually provide a relatively complete explanation of the factors going into the limit-setting decision. In that way a statement of doubt is less naked and the basis for the limits set can be more adequately stated.

§5.221 -- Sodium

This section contains a few specific references which indicate quite clearly the intent to prescribe a limit for the purposes of the local populace rather than the transient user. Reference is made to "home-water softeners of conditioners" and also to the necessity of water utilities distributing water containing more than 20 mg per liter of sodium to inform "physicians practicing in their service area" of this fact so that the level of sodium "may be considered in prescribing diets" (page 41 of the draft). In addition, the limit set is obviously unrelated to any acutely toxic level (if there is one). This problem has been discussed above in connection with section 5.212. Again, I do not think there is any necessity to make substantial changes in the limits themselves provided that some introductory language is added to the standards which makes it somewhat more obvious that they do not purport to establish enforceable regulations in connection either with non-communicable health problems or water usage by the non-transient population.

§5.3 -- Radiological quality

Of course, this section raises many of the same problems that have been discussed in the chemical and physical standards and those considerations will not be repeated.

As now drafted sections 5.314 and 5.325 state that if a water supply does not meet the radiological standards provided than it shall not be certified. However, as long as the legal status of these standards is comparable to the chemical and physical standards, then a section similar to section 5.215 (Necessary Action) in the chemical and physical limits might be properly worked into the radiological section. Section 5.215, as noted above, requires prompt evaluation by the appropriate authority rather than outright rejection of the water supply if it fails to meet the limits.

Two terms are used throughout section 5.3 which could use definition. The first of these is "control measures". This term is used in §§5.312, 5.322, 5.323 and 5.324 in connection with the "stepped" regulation of increasing levels of radiation found in the water. Once a given level is reached the water can be only "provisionally" certified and then only "with control measures", whereas at a lower level of radiation the water can be so certified "without control measures". However, even at lower levels "sampling and analytical measures" are required, implying some sort of periodic review. Thus, the presence or absence of periodic review does not seem to be the distinction intended by the use of the term "with" or "without control measures". Not having a technological background I may be missing the boat here. However, I raise the question anyway and suggest that some definition may be appropriate.

The second term which I find confusing is "provisionally certified". Since I assume that even a "full" certification provides for some ongoing review or reporting requirements, and the possibility of revocation should the limits be exceeded, I do not see what is added by the word "provisionally". Perhaps therefore some further explanation or definition of this term is also necessary.

§ § § § § § §

OIL AND HAZARDOUS SUBSTANCES

TITLE: Outer Continental Shelf; Applicability of FWPCA

DATE: August 3, 1973

The Geological Survey is interested in determining whether EPA has jurisdiction over discharges from drilling rigs operating on the outer continental shelf pursuant to the provisions of the Outer Continental Shelf Lands Act. At a meeting between USGS and interested EPA representatives on August 3, 1973, I expressed my opinion that it does, although the meeting was prefaced with a disclaimer on EPA's part that our opinions did not yet bear the imprimatur of our senior officials. This memorandum is my initial step towards obtaining such an imprimatur from OEGC.

Section 301 of FWPCA prohibits the discharge of any pollutant, except as in compliance with certain enumerated sections of the statute. Section 502(12) defines "discharge of a pollutant" as

> "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone *or the ocean from any point source other than a vessel or other floating craft.*" (Emphasis added.)

Assuming for the moment that an offshore drilling platform is not a "vessel or other floating craft", it clearly engages in discharges of pollutants to ocean waters within the meaning of section 502(12), even when it is outside the territorial sea and the contiguous zone.

Any ambiguity in section 502(12) arises from the fact that it is, on its face, impermissibly broad as a matter of international law: surely the Congress has no authority, nor did it intend, to prohibit discharges anywhere in the world's oceans by any person. I believe it is clear, therefore, that any judge would seek to limit the combined effect of sections 301 and 502(12). But whatever the scope of those limitations, I do not believe he would feel free to exclude discharges from a drilling rig on the outer continental shelf.

The OCSLA provides, in 43 U.S.C. §1333(a)(1) that

> "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer continental shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer continental shelf were an area of exclusive federal jurisdiction located within a state . . . ."

I believe the blanket assertion of jurisdiction in the FWPCA with respect to ocean waters, coupled with the notion in the OCSLA that an artificial island or fixed structure on the outer continental shelf is, in contemplation of law, tantamount to an area of exclusive federal jurisdiction located within a state, leads to the conclusion that EPA has jurisdiction to issue permits under section 402 of the FWPCA for the discharge of pollutants from such structures, even if they lie seaward of the territorial sea and contiguous zone.

§ § § § § § §

CONTROL OF OIL POLLUTION

TITLE: State May Impose it's Own Sanctions Against Discharge of Oil into Waters Situated within its State

DATE: May 11, 1971

Honorable C. W. Bill Young
House of Representatives
Washington, D. C. 20515

Dear Congressman Young:

This is in reply to a verbal request as communicated by Mr. Richard Nellius of the office of the Honorable C. W. Bill Young on May 5, 1971 for our interpretation of Section 11 of the Federal Water Pollution Control Act as amended by Section 102 of the Water Quality Improvement Act of 1970, 33 U.S.C. 1161, relating to the control of pollution by oil.

Specifically, you request confirmation of your understanding that the foregoing section does not operate to preempt a state from imposing its own sanction against the discharge of oil into any waters situated within a state. Please be advised that your understanding of Section 11 is correct as evidenced by subsection (o)(2) of 33 U.S.C. 1161 which provides as follows:

> "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State."

Conference Report No. 91-940 of March 24, 1970 which accompanied H.R. 4148 (later enacted as the Water Quality Improvement Act of 1970) provides the following explanation (at page 42) of congressional intent as regards the foregoing provision:

> "Paragraph (2) of subsection (o) disclaims any intention of preempting any State or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters in that State. Thus, any State would be free to provide requirements and penalties similar to those imposed by this section *or additional requirements and penalties.* These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts." (emphasis supplied)

§ § § § § § §

TITLE: Control of Pollution from Offshore Facilities

DATE: March 17, 1971

QUESTIONS

You have asked (1) whether the Administrator legally may sign the MOU as presently drafted; (2) for an analysis of the MOU as presently drafted; and- (3) for comments on Commissioner Dominick's question regarding a possible overlap of authority between EPA and the Coast Guard under Section 11 of the FWPCA and the National Contingency Plan, on the one hand, and the USGS under the OCS Act and regulations, on the other.

ANSWERS

1. The Administrator legally may sign the MOU as presently drafted.

2. We have analyzed all provisions of the present draft of the MOU, and they are legally acceptable. Our comments follow.

3. A duplication of authority exists with respect to spills within the contiguous zone: under Section 11 of the FWPCA and the National Contingency Plan, the Coast Guard has authority to direct removal of spills in this zone; while USGS also has this authority under the OSC regulations, since this zone is part of the Outer Continental shelf. In addition, the National Contingency Plan gives authority to the Coast Guard to remove spills beyond the contiguous zone which threaten waters within it or the shoreline; for such spills, a duplication of authority also exists between the Coast Guard and USGS.

No duplication of authority exists regarding authority to prescribe spill prevention equipment for offshore facilities. EPA has this authority with respect to facilities within the boundaries of the States; USGS has this authority with respect to facilities seaward of these boundaries, including facilities within the contiguous zone.

The MOU might be used to resolve any questions that might arise in connection with this overlap of authority. However, if the MOU were to cover this point, DOT would have to be made a party in order to commit the Coast Guard.

DISCUSSION

1. Analysis of Present Draft of MOU, and Discussion of Legal Basis.

Section 1 of the draft simply provides that EPA will assist Interior in preparing environmental impact statements on OCS oil and gas lease sales. This is in accord with the obligation of Interior under Section 102(2)(C) of the National Environmental Policy Act to consult with appropriate Federal agencies regarding environmental impact.

Section 2 provides that EPA and Interior will jointly develop a reliability analysis procedure for pollution control safety devices to be incorporated in their respective regulations; and will undertake reliability analysis studies. OCS lessees will be required to submit reliability analysis reports jointly to Interior and EPA. Section 3 provides that in order to achieve compatibility between their respective regulations governing offshore facilities, EPA will advise Interior with respect to procedures and requirements to be incorporated in Interior's regulations, while Interior will advise EPA with respect to the operation of offshore facilities. There is adequate legal basis for these provisions. EPA has jurisdiction under Section 11(j)(1)(C) to promulgate regulations for pollution control equipment on offshore facilities, while Interior has this authority under Section 5(a) of the OCS Act. (43 U.S.C. 1334(a)) There is no legal reason why the two agencies cannot consult with each other while exercising this authority. We would suggest, however, that the apparent purpose of Sections 2 and 3 be made more explicit; i.e., that the agencies agree that they will attempt, as nearly as practicable, to agree on a uniform set of regulations for pollution control equipment on offshore facilities. It would seem that the pollution control regulations governing offshore facilities should not differ according to whether the facility is located within or without the State's boundary, simply because a different agency has jurisdiction, unless there is a technical basis for differing requirements. The agencies ought to attempt to eliminate any differences that do not have some such technical basis.

Section 4 of the draft MOU provides that EPA will furnish Interior with technical advice and assistance in connection with any action taken by Interior under the OCS regulations in case of a spill on the Outer Continental Shelf, and EPA's costs in this connection will be borne by the lessee. This provision accords with the present OCS regulations, which provide that where the lessee fails to control and remove the pollutant, USGS may do so "in cooperation with other appropriate agencies of the Federal, State and local governments * * * in accordance with any established contingency plan for combating oil spills or by other means at the cost of the lessee." 30 C.F.R. 250.43.

Section 5 also provides that EPA will survey the damage caused by a pollution incident on the Outer Continental Shelf, and that its costs for the survey will be assessed on the lessee. There could be some controversy as to whether the cost of making a damage survey is covered by the present OCS regulation, which makes the lessee assessable only for the cost of "the control and removal of the pollutant." 30 C.F.R. 250.43(b). However, Section 5 of the draft MOU commits Interior to make appropriate changes in its regulations to reflect the cost assessment. And there can be no challenge to the authority of Interior to make such changes, in view of its broad authority to promulgate regulations under Section 5(a) of the OCS Act. 43 U.S.C. 1334(a).

Section 5 of the draft MOU also provides that any damage survey made by EPA may be made available by EPA in litigation. This provision is probably unnecessary, since the damage surveys would be subject to subpoena in any event and would also be subject to disclosure under the Public Information Act. 1/ However, there can be no harm in including the provision in the MOU.

1/ The exemption in the Public Information Act for internal government memoranda, (5 U.S.C. 552(b)(5)), has been held to apply only to memoranda of policy advice and recommendation -a description which would not fit a damage survey. Ackerly v. Ley, 420 F. 2d 1336, 1340-41 (C.A.D.C. 1969);

Section 6 of the draft MOU commits the USGS to comply with Coast Guard requirements under the national and regional contingency plans and Coast Guard regulations regarding methods of control and use of dispersants. This presents no problems. Under its regulations, USGS has authority to remove oil "in accordance with any established contingency plan for combating oil spills or by other means." 30 C.F.R. 250.43. Thus USGS clearly can commit itself to follow Coast Guard regulations and the national and regional plans.

Section 7 of the draft MOU commits the agencies to establish communications at regional and headquarters levels to expedite implementation of the MOU. Section 8 provides for possible future extension of the MOU to cover pollution problems caused by other mineral extractive activities. Neither section presents any problems.

2. Overlap of Authority between EPA/Coast Guard and USGS.

A. Responsibilities of USGS under OCS Act and Regulations.

The basic authority of the Secretary of the Interior under the Outer Continental Shelf Lands Act is vested by Section 8(a), which authorizes the Secretary "to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the Outer Continental Shelf." 43 U.S.C. 1337(a). Section 5(a) directs the Secretary to "administer" the provisions of this subchapter relating to the leasing of the Outer Continental Shelf" and to "prescribe such rules and regulations as may be necessary to carry out such provisions." 43 U.S.C. 1334(a). The Secretary is also given authority to "prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf." Ibid. Thus the extent of the Secretary's jurisdiction is the leases on the Outer Continental Shelf. The Act defines the Outer Continental Shelf as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters" to the extent that these submerged lands are subject to the jurisdiction and control of the United States. 43 U.S.C. 1331(a). The phrase "lands beneath navigable waters" is in turn defined, in the case of tidal waters as extending out to three miles from the coast line and out to the boundary line of the State where it extends seaward beyond three miles. 43 U.S.C 1301(a).

1/ (continued from previous page)

General Services Administration v. Benson, 415 F. 2d 878 (C.A. 9, 1969); Consumers Union v. Veterans Administration, 301 F. Supp. 796, 805 (S.D. N.Y. 1969). The same test governs the question of whether the internal memorandum is subject to subpoena; a factual survey may be subpoenaed. See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 C.D. D.C. 1966), aff'd. 384 F.2d 979 (C.A.D.C. 1968), cert. denied 389 U.S. 952; Freeman v. Seligson, 405 F.2d 1336, 1339 (C.A.D.C. 1968).

Under the OGS regulations, lessees on the Outer Continental Shelf are required to comply with orders of the supervisor (who is under direction of the USGS). 30 C.F.R. 250.11, 250.12(a). In addition, if "the waters of the sea are polluted by the drilling or production operations" of the lessee, the supervisor has the right, where the lessee fails to control or remove the pollutant, "to accomplish the control and removal of the pollutant in accordance with any established contingency plan for combating oil spills or by other means at the cost of the lessee." This is to be done "in cooperation with other appropriate agencies of the Federal, State and local governments, or in cooperation with the lessee, or both." 30 C.F.R. 250.43(b).

In short, the jurisdiction of the USGS, as it administers supervisors of OGS leases, is over the operations of lessees on the Outer Continental Shelf, and over the cleanup of oil spills caused by such operations. The Outer Continental Shelf extends seaward of the boundaries of the States.

B. Responsibilities of EPA and the Coast Guard under Section 11 of FWPCA and the National Contingency Plan.

Section 11(c)(1) of the Federal Water Pollution Control Act gives the President authority to act to remove oil which is "discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone* * *." Section 11(c) directs the President to implement his authority to remove discharged oil by publishing a National Contingency Plan. This has been done by the CEQ, pursuant to delegation.

The plan established procedures for removing oil spills "for all United States waters, shoreface, or shelf bottom." Section 103.1. The Coast Guard has the responsibility of providing on-scene Commanders to direct removal operations. Section 306.2.

The President also has authority, which has been delegated to EPA, under Section 11(j)(1) of the FWPCA to prescribe regulations for "equipment to prevent discharges of oil* * *from* * *offshore facilities* * *." "Offshore facilities" are defined as facilities located in "any of the navigable waters of the United States." Section 11(a)(10), (11). The term "navigable waters of the United States" is not defined, but the legislative history makes it clear that "offshore facilities" are limited to facilities in waters within the boundaries of the States. 2/

In short, the Coast Guard has authority under Section 11 of the FWPCA to remove oil spills in the navigable waters of the United States (i.e., out to the boundaries of the States) and in the contiguous zone. EPA has the authority to require spill prevention equipment on facilities within the States' boundaries.

2/ The Conference Report on the Water Quality Improvement Act of 1970 states (Conf. Rept. No. 91-40, 91st Cong. 2d Sess., at p. 37):

> "The definition of 'offshore facility' means any facility of any kind located in, on, or under any of the navigable waters of the United States other than a vessel or public vessel. This would include offshore drilling rigs as well as all other States which, in the case of coastal waters would extend to the seaward boundaries of the States within the meaning of the Submerged Lands Act."

C. Overlap of authority

There is no overlap of authority with respect to the prescribing of spill prevention equipment on offshore facilities. EPA has the authority within the States' boundaries, while USGS has the authority seaward of the boundaries. There is, however, overlap with respect to the cleanup of oil spills. Under Section 11 of the FWPCA the Coast Guard has the authority to direct cleanup for any spill in the contiguous zone (i.e. seaward of the States' boundaries to a line 12 miles out), while USGS also has this authority under 30 CFR. 250.43 for any spill on the Outer Continental Shelf seaward of the States' boundaries (including spills in the contiguous zone). This overlap is extended by Section 103.1 of the National Contingency Plan, which asserts authority on the part of the Coast Guard over any spill seaward of the contiguous zone "where there exists a threat to United States waters, shoreface, or shelf bottom."

D. Recommendation

The Memorandum of Understanding could be utilized to delineate the areas of responsibility with respect to spills in the contiguous zone and spills beyond this zone which threaten waters within it or the shoreline. One possible resolution of the problem would be for USGS to agree to accept direction from the Coast Guard On-Scene Commander under the National Contingency Plan for any spill occurring in the contiguous zone. This would include specifically USGS's agreement to join in any order which the On-Scene Commander may wish to issue to operators of offshore facilities involved (so that these operators cannot claim any fear of receiving conflicting orders). With respect to spills occurring seaward of the contiguous zone but which are believed to threaten waters within it or the shoreline (so that the National Contingency Plan would apply), the Coast Guard might agree by the Memorandum of Understanding to accept direction from the USGS. There are two reasons for agreeing to the authority of USGS in this area: (1) The statutory basis for the extension of authority asserted in the National Contingency Plan over spills beyond the contiguous zone which threaten waters within it or the shoreline is not clear;3/ and (2) even conceding the validity of this extension of authority, the operator of the facility in particular cases may wish to contest whether the requisite threat to the contiguous zone or the shoreline exists as a factual matter. If the Memorandum of Understanding covers these matters, the Coast Guard should be committed, and consequently DOT would have to be a party.

3/The authority to remove spills under Section 11(c)(1) extends to oil "discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." In the case of a spill which occurs beyond the contiguous zone but which spreads into it or threatens to spread into it, the question would be whether this was a discharge "into or upon the waters of the contiguous zone."

§ § § § § § §

TITLE: Oil Sheen and Equipment Regulations

DATE: August 19, 1971

This is in response to your note of August 13, 1971.

1. You have inquired as to the correctness of Mr. Biglane's position that the regulations should provide that an operator who obtains an equipment certification should thereby also obtain a "variance" from the prohibition against discharging oil in such quantity that it forms a sheen. For the reasons that follow I believe that no such variance need be or should be provided.

As written by us, and as submitted to the Administrator, the draft regulation did amend Section 610.5 of 18 CFR to provide that the sheen test "does not apply to discharges from offshore or onshore facilities when such facilities are in compliance with the requirements of Part 611 [the draft oil equipment regulations]." We provided this exclusion because, as Mr. Biglane notes, the state of the art is such that even the best feasible treatment cannot always assure that no sheen will be produced by the treated discharge. We felt that those operators with certified equipment should not have to worry if they produced an occasional sheen beyond their control.

At the briefing, Mr. Ruckelshaus said that he was extremely reluctant to allow any semblance that he was backing off from the sheen test. Therefore, he disapproved of the specific exemption from the sheen test that we had provided for operators with certified equipment, and said that this was one reason why he wished more study before he would act on this problem. I then suggested that this aspect of the problem might be solved merely by publishing the regulations without a specific provision that operators of certified equipment would be excused from the sheen test, while achieving that result by the use of discretion in choosing whom to sue. The word could be passed to the operators that, as a practical matter, those with properly operating certified equipment would not be sued for violations of the sheen test beyond their control. Mr. Ruckelshaus said that this suggestion had some merit and was worth study.

Mr. Biglane's objection to the suggestion that we can do without an explicit "variance" provision is unfounded. He is worried that without such a provision an operator of equipment certified by EPA to be the best feasible might nonetheless be sued if his discharge accidentally produced a sheen. But obviously we would never recommend an action for violation of the sheen regulation in such circumstances. Moreover, any halfway decent oil company lawyer could appreciate that. Mr. Biglane correctly notes that the Coast Guard rather than EPA enforces the sheen regulations under Section 11(b)(5). I am sure, however, that we can arrive at an understanding with the Coast Guard that it will not assess penalties under Section 11(b)(5) when there is a discharge from a rig which we have certified as having the best feasible treatment equipment and which has been properly operated according to procedures we have approved.

I think that Mr. Biglane's suggested remedy that, for example, we explicitly tell an operator that he may produce, say, three sheens per month, would require us to take precisely the unacceptable and misleading public position rejected by the Administrator, and would not really provide a suitable solution to the problem. This is because the occasional production of a sheen, even with the best equipment, frequently comes about because of natural conditions, such as extreme calm or a high background presence of oil in the receiving water. Such caprices of nature are beyond an operator's control, and it is senseless to say that he is to be allowed to be visited by, say, three of them per month.

2. As you might expect, I regard Mr. Zener's suggestion that the regulations be published under the authority of Section 11(j)(1)(C) to be sound.

At the briefing, Mr. Biglane told Mr. Ruckelshaus that of the 500 drilling rigs in Louisiana waters at whom these regulations would primarily be aimed, 400 already had good treatment equipment. Mr. Ruckelshaus then questioned why this entire regulatory scheme was needed when a few Refuse Act actions against the recalcitrant operators might clear the whole thing up.

This was a good question, and unfortunately neither Bob nor I saw the answer to it at the time. The answer is that the Refuse Act is now irretrievably tied to the permit program, and that a discharger can stave off an unvarnished Refuse Act lawsuit by applying for a permit. Thus the hundred non-treating operators, along with the 400 supposed good guys, would end up filing permit applications. The work required in processing those would be substantially identical to that which we would have to perform in administering the proposed equipment regulations under Section 11(j)(1)(C). Therefore it is quite unlikely that the Administrator's suggestion of use of the Refuse Act would end up saving much for EPA.

For this reason the alternatives discussed by Mr. Zener's memorandum are Section 11(j)(1)(C) and the permit program. Between the two, I believe 11(j)(1)(C) to be much superior. You are acquainted with the presence of pitfalls of several descriptions in the permit program. Moreover, Section 11(j)(2) provides EPA a stiff administrative penalty of up to $5,000 per violation for violation of equipment regulations. This is vastly superior in my view to the much more cumbersome injunctive and criminal remedies available for violation of a permit.

Another difficulty with the permit program is that offshore oil producers are asserting that they are not subject to the Refuse Act because they are not a "wharf, manufacturing establishment, or mill of any kind" within the meaning of Section 13. While this claim borders on the frivolous, you can never tell what a judge in the Easter District of Louisiana is going to say, especially concerning that industry, and therefore our authority under the Refuse Act may not be definitely settled for another year or two. Our authority under Section 11(j)(1)(C) is unquestionable.

3. There was no surname copy of the draft regulations as such, but there was a draft memorandum from Mr. Mosiman to the Administrator recommending that he approve the regulations; this memo was surnamed by me, Mr. Zener, and Mr. Biglane.

§ § § § § § §

TITLE: Oil Removal Authority

DATE: October 11, 1972

Rear Admiral W. L. Morrison
Chief Counsel
United States Coast Guard
400 Seventh Street, S. W.
Washington, D. C. 20590

Dear Admiral Morrison:

I have your letter of September 26, 1972, asking for our views on the question of whether federal agencies may conduct oil removal activities on waters which are not navigable waters of the United States, and obtain reimbursement from the revolving fund established under section 11(k) of the Federal Water Pollution Control Act. I agree with the conclusion presented in the staff analysis enclosed with your letter, to the effect that such removal is authorized, where removal of oil from non-navigable waters is necessary to prevent the oil from reaching the navigable waters of the United States.

I would like to suggest one further argument, in addition to the considerations set forth in your staff analysis, which would support this conclusion. We think that a person who discharged oil into non-navigable waters could be sued by the federal government for an injunction directing removal, where it could be shown that removal was necessary to prevent the oil from reaching the navigable waters of the United States. While such a remedy may not be explicitly authorized by either the Refuse Act or by section 11 of the FWPCA (except in the circumstances outlined in sections 11(d) and (e)), the federal courts have exhibited a willingness to go beyond the specific terms of federal anti-pollution statutes in order to fashion effective remedies in this area. Cf. *United States v. Republic Steel Corp.*, 362 U.S. 482; *Illinois v. Milwaukee*, 4 ERC 1001 (U.S. Sup. Ct. 1972). And if injunctive relief would be available against the discharger to prevent the oil from reaching the navigable waters of the United States, the federal government could require the discharger to reimburse it for the costs of removal where the discharger has refused to clean up and where a federal court order could not be obtained in time to prevent damage to the navigable waters. See *Wyandotte Transportation Co. v. United States*, 389 U.S. 191; and *United States v. Perma Paving Co.*, 332 F. 2d 754 (2d Cir. 1964). Finally, even if reimbursement for the federal removal were obtained as a judicially-fashioned remedy to protect the federal interest established by the Refuse Act and section 11 of the FWPCA, rather than as an explicit statutory remedy, we think that the relationship of the remedy to section 11 would be sufficiently close to permit use of the revolving fund to finance the removal, and to permit the proceeds of the recovery from the discharger to be deposited in the revolving fund.

§ § § § § § §

OCEAN DUMPING AND MARINE SEWAGE

TITLE: Request for Ocean Dumping Permit

DATE: May 28, 1971

The American Cyanamid Company has asked EPA to grant a "clearance" to allow it to dump wastes from its Savannah, Georgia plant in the ocean past the continental shelf. Apparently American Cyanamid's position is that we should consider their request even though there is presently no law giving the Administrator the power to grant it, and legislation concerning ocean dumping is now pending in Congress. I believe that we should refuse to consider American Cyanamid's request, for the reasons which follow, and have accordingly drafted the attached letter for your signature.

1. The most obvious reason why EPA should not act upon American Cyanamid's request is that we have no power to do so. No law gives us the right either to prohibit or to put EPA's imprimatur on ocean dumping (except for oil and hazardous substances within the contiguous zone and the control exercised through leases for oil drilling on the continental shelf, all irrelevant here since American Cyanamid proposes to dump 85 miles out, past the continental shelf and well past the contiguous zone). Since EPA, like other federal agencies, has only the powers given it by Congress, we can do nothing. Therefore we should do nothing.

2. Moreover, apart from the question of what we can do, we should not make any public evaluation of American Cyanamid's request. Congress is presently considering in committee the Administration's proposed Marine Protection Act of 1971. As submitted, section 4 of that proposed act would prohibit ocean dumping of the sort proposed by American Cyanamid without a permit from the Administrator. However, we cannot be sure of whether, and in what form, the bill will emerge from committee and from the Congress itself. If EPA started to administer the proposed bill as if it were law in its present form (or, indeed, in any form), we would certainly risk the tremendous wrath of Congress for intrusion upon its authority to make law.

Moreover, if we were to grant American Cyanamid's request on any terms we would be subject, deservedly or not, to the public criticism that EPA is so anxious to permit ocean dumping of pollutants that we are willing to license the practice even before Congress has given us the power to do so.

Finally, the file contains Mr. Dominick's recommendation against granting a permit for ocean dumping to American Cyanamid. In so recommending, he stated that American Cyanamid had not fully explored possible alternatives to ocean dumping, some of which seemed promising to EPA technical personnel. Thus, American Cyanamid's submission on the merits is hardly compelling.

§ § § § § § §

TITLE: EPA Jurisdiction with Respect to Floating Nuclear Power Plants

DATE: August 27, 1973

Mr. A. Giambusso
Deputy Director for Reactor Projects
Division of Licensing
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dear Mr. Giambusso:

At the August 6, 1973, meeting of the Interagency Regulatory Steering Committee for floating nuclear power plants, we were asked to submit a written inventory of the regulatory, consultative and review functions EPA would apparently exercise with respect to floating nuclear power plants.

Although the extent of our jurisdiction is in some respects unclear, or dependent upon the location of the floating facility, we believe the following items prepared by Mr. R. McManus of our Office of Enforcement and General Counsel are responsive to your request:

1. Discharge permits. Section 301 of the Federal Water Pollution Control Act (FWPCA) prohibits discharges, without a permit, of pollutants into the territorial sea from any point source. By virtue of the definition in Sec. 502(12), however, this prohibition applies outside the territorial sea only to point sources other than vessels and other floating craft. Thus, if a floating facility is deemed not to be "floating craft," it would require a sec. 402 permit in any case; and, if it is deemed to be a "floating craft," it may be that its operating discharges would constitute ocean dumping within the purview of the Marine Protection, Research and Sanctuaries Act, P. L. 92-532. Permits under the FWPCA would be issued in accordance with the procedures in Part 125, Title 40, CFR, unless, of course, the facility is located within the territorial waters of a state that has an approved permit program under Sec. 402 of FWPCA, in which case the state's procedures would be applicable; in any case, the state procedures would have to conform with the guidelines set forth in Part 124 of Title 40.

2. Construction. If a breakwater were constructed inside the territorial sea, the ocean dumping act would appear inapplicable, by virtue of the fact that the Corps of Engineers' jurisdiction under Sec. 10 of the Rivers and Harbors Act of 1899 would trigger the exclusion from the definition of dumping in Sec. 3(f) of the Act. But, if such construction occurred outside the three-mile limit, an ocean dumping permit would be required. Applicable procedures are set forth in Part 222 of Title 40.

3. Thermal Discharges. Operating discharges of heated effluents permitted under FWPCA, whether by EPA or a state, would be subject to the effluent guidelines established under Sec. 304, unless the permittee wished to invoke the "variance" procedures of Sec. 316 -- a likely option, in view of the presumed resistance of off-shore ocean waters to thermal pollution. Procedures have not yet been established under Sec. 316.

4. State Certification. Prior to the issuance of any permit (including applicable AEC permits) "which may result in any discharge into the navigable waters," Sec. 401 of FWPCA would require certification from any state in whose territorial sea the discharge originates, to the effect that the discharge will comply with applicable provisions of Sections 301, 302, 306 and 307 of FWPCA. (It appears possible that the certifying agency would have to consider whether applicable state water quality standards would be violated by the discharge in question.) If no state agency has been designated in accordance with Sec. 401, EPA would act in lieu of a state agency, in accordance with procedures set forth in Part 115 of Title 40 (which is presently undergoing revision).

5. Environmental Radiation Standards. Reorganization Plan No. 3 transferred the functions of the Atomic Energy Commission to the Environmental Protection Agency ". . . to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material." As a result of this transfer, Sec. 161(b) of the Atomic Energy Act, P.L. 83-703, provides that the Administrator may, within the above framework, "establish by rule, regulation, or order, such standards to govern the use of special nuclear material, source material, and by-product material as (he) may deem necessary or desirable to . . . protect or to minimize changes of life or property."

Section 274(h), P.L. 86-373, provides that "The (Federal Radiation) Council shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States."

6. Environmental Impact Statements. EPA would, of course, be consulted in connection with any statement prepared under Sec. 102(2)(C) of NEPA with respect to a floating nuclear power plant.

Any of the above functions, of course, would have to be performed prior to a discharge.

VESSEL WASTE

VESSEL SEWAGE REGULATIONS UNDER THE FWPCA

TITLE: Federal Pre-emption of Marine Sanitation Device Standards

DATE: February 12, 1971

FACTS

Section 13(b)(1) of the Federal Water Pollution Control Act requires EPA to promulgate Federal performance standards for marine sanitation devices on vessels; and for DOT to promulgate design, construction, etc. standards consistent therewith.

QUESTION

May the Federal government permit a State to impose stricter standards than the Federal standards?

ANSWER

No. However, EPA may, under the limited conditions expressed in §13(f), permit a State to impose an absolute prohibition upon discharges if expressed in a particular water quality standard.

DISCUSSION

Section 13(f) provides for Federal preemption in the standards-setting area as follows:

> "(f) After the effective date . . . no state . . . shall adopt or enforce any statute or regulation of such State . . . with respect to . . . any . . . device . . . subject to . . . this section . . . "

The foregoing pre-emption was considered necessary to avert conflicting local standards and regulations which the Congress recognized as constituting "a hardship to recreational boaters who move between States and potentially serious restrictions on interstate movement of commercial vessels."1/

1/ Page 12 of Senate Report No. 91-351, dated 8/7/69, of the Committee on Public Works, on S. 7., a companion bill to H.R. 4148 which was enacted into the Water Quality Improvement Act of 1970.

However, the Congress also recognized that there exist prohibitions in water quality standards against waste discharges in areas designated "for protection of public drinking water supplies, shellfish beds and areas designated for body contact recreation."2/

Consequently, authority was provided in the second sentence of subsection (f) to permit no-discharge provisions of water quality standards to take effect under the following limitations:

1. Upon application by a State to EPA;

2. If the State's water quality standards contain a blanket no-discharge provision for the body of water in question.

3. Upon EPA's determination as to #2.

§ § § § § § §

TITLE: Effective Date of No-Discharge Regulations

DATE: April 14, 1971

QUESTION

In the course of drafting the vessel sewage regulations, the question has arisen as to when no-discharge regulations, issued under Section 13(f) upon application of the States, may become effective.

CONCLUSION

The literal language of the statute would seem to allow us to make such a regulation effective at any time. However, the context of the no-discharge provision indicates that no-discharge regulations may not go into effect until pre-emption has occurred -- i.e., until two years after promulgation of the initial standards and regulations for new vessels, and five years after promulgation for existing vessels. Until pre-emption occurs, the States which desire no-discharge requirements for any waters of the State may adopt and enforce such requirements themselves, without Federal intervention. Accordingly, during this period, Federal no-discharge regulations issued upon State application are not needed.

2/ Id at Pg. 13.

DISCUSSION

The context of the no-discharge provision makes it clear that no-discharge regulations may not go into effect until the initial standards and regulations issued under 13(b)(1) go into effect. This is because the no-discharge provision was intended to alleviate the effects of pre-emption, and pre-emption does not occur until the initial standards and regulations go into effect. Thus the no-discharge provision immediately follows the pre-emption provision, both occurring in the same subsection 13(f). And no-discharge regulations may only be issued on application of the State involved; if pre-emption were not in effect, the State could adopt the no-discharge requirement itself rather than applying to the Federal Government. In addition, the legislative history confirms that the no-discharge provision was intended to alleviate the effects of pre-emption.

Both the Senate and House bills preserved the States' jurisdiction to completely prohibit discharges in particular waters, despite pre-emption. Clearly, these provisions would have gone into effect only when pre-emption occurred. 1/ The Conference Committee substituted the present version, without, however, indicating that there was any intent to change the effective

---

1/ The Senate bill read (S. 7, Sec. 11(f), as reported, Sen. Rep. 91-351):

> "(f) After the effective date of any standards and regulations established pursuant to this section, no State or political subdivision thereof shall adopt or enforce any statute or regulation with respect to the design, manufacture, installation, or use of any marine sanitation device in connection with any vessel subject to the provisions of this section, except that nothing in this subsection shall restrict the authority of a State to prohibit the discharge of sewage in any waters within a State where implementation of applicable water quality standards requires such prohibition."

The House bill read (H.R. 4148, Sec. 18(f), as reported, H.R. Rep. 91-127):

> "(f) After the effective date of the initial standards and regulations promulgated under this section, no State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation of any marine sanitation device on any vessel subject to the provisions of this section, except that nothing in this section shall be construed to affect or modify the authority or jurisdiction of any State to prohibit discharges of sewage whether treated or not from a vessel within all or part of the intrastate waters of such State if discharges from all other sources are likewise prohibited."

out, however, indicating that there was any intent to change the effective date of the no-discharge provision. H. R. Rep. 91-940, 91st Cong. 2d Sess. at 46, 47, 49. Senator Boggs' summary of the conference action makes it clear that the final version was still intended to alleviate the effect of preemption, and that the change was intended only to insert the Federal Government into the procedure -- not to change the effective date:

> "The major alteration from the Senate version appears in subsection (f) of Section 13 of the new bill. The original Senate version left to the States the determination on whether sewage discharges should be barred completely in specific areas within that State if the 'implementation of applicable water quality standards requires such prohibition.'"
>
> "The House version gave the States a right to bar sewage discharge only in waters where all other discharges of sewage were prohibited."
>
> "The new proposed version wisely inserts the Secretary of the Interior into this procedure. Under the compromise version, a State may apply to the Secretary for the right to prohibit discharges in a specified area. The Secretary may then prohibit such discharges in the area if he finds that compliance with applicable water quality standards requires such a prohibition."
>
> "This new language, I believe, preserves the intent of the Senate version, leaving with the States the right to achieve as full protection as possible in the areas of shellfish beds, marinas, drinking water intakes, bathing beaches, and other areas that could be adversely affected by a discharge from even the most highly treated vessel sewage."

Cong. Rec. S 4422 (March 24, 1970).

§ § § § § § §

TITLE: The Size of No-Discharge Areas

DATE: June 24, 1971

The legislative history of 91-224 offers strong evidence that Congress intended to limit the size of no-discharge areas for which the states could apply. Specifically, Congress intended to limit no-discharge areas to areas designated for public drinking water, shellfish beds, bathing beaches, and other areas that require high water purity. Theoretically, a state could have all its waters designated as a no-discharge area, but only upon showing that water quality standards require such a prohibition.

The first reason for this conclusion involves the Congressional intention to pre-empt the field in the regulation of vessel sewage. (Expressed, for example, on p. 12 of the Senate Committee Report). Although the preemption was intended to provide uniform control over marine sanitation devices (not no-discharge areas), the reason for this uniformity was to avoid subjecting vessels travelling interstate to conflicting standards in meeting sewage disposal criteria. If states were allowed to declare their entire waterways as no discharge areas, then there would be no value in preempting the marine sanitation devices field: states could easily avoid the consequences and subject the interstate traveller to the inconsistencies that 13(f) was trying to avoid. Thus, the obvious intent of Congress to pre-empt the field must serve to limit the area which states can have declared no-discharge zones.

Second, two changes that were made in the bill in Conference reflect a Congressional intendment that no-discharge areas be limited. The first change is in 13(f). Prior to the Conference, both versions of the bill allowed the individual states to declare "all or part" (in the House), or "any" (in the Senate) intrastate waters no-discharge areas. The Conference Committee made two changes. First, it required the States to apply to the Secretary of the Interior in order to have a body of water be a no-discharge area. And second, "all or part" and "any" was changed to read "those waters . . . which are subject of the application and to which such standards apply." [Emphasis added] As explained by a statement by Senator Boggs, introduced into the Congressional Record of 3/24/70 at p. S4422 by Senator Cooper:

> "The major alteration of the Senate version appears in Subsection (f) of Section 13 of the new bill. The original Senate version left to the States the determination of whether sewage discharges should be barred completely in specific areas within the State if the 'implementation of applicable water quality standards requires such prohibition.'
>
> The House version gave the States a right to bar sewage discharge only in waters where all other discharges of sewage were prohibited.
>
> The new proposed version wisely inserts the Secretary of the Interior into this procedure. Under the compromise version, a State may apply to the Secretary for the right to prohibit discharges in that area if he finds that compliance with applicable water quality standards requires such a prohibition.
>
> This new language, I believe, preserves the intent of the Senate version, leaving with the States the right to achieve as full protection as possible in the areas of shellfish beds, marinas, drinking water intakes, bathing beaches, and other areas that could be adversely affected by a discharge from even the most highly treated vessel sewage."

Thus, by obviating the potential arbitrary and limitless discretion of the states, and by restricting potential no-discharge areas to areas where water quality standards require such a prohibition, the compromise bill that was passed into law expressed the intent of Congress to limit the extent of state-desired no-discharge areas to certain areas.

Finally, several statements made during the discussion of the bill point to the intention to limit the size of no-discharge areas. The most definitive statement appears in the Senate Report of the Committee of Public Works (p. 12):

> "[The Committee is aware of the] necessity to relate any sewage treatment control measure to existing water quality programs. [Thus, the States have the authority to prohibit any discharge] if a water quality standards plan for implementation requires such restrictive measures. This exception is not [p. 13] intended to be broadly construed. A State cannot prohibit vessel waste discharges for all of its rivers, and lakes and coastal waters unless the State has in fact adopted standards which establish uses for all of those waters which require such an absolute prohibition.
>
> In effect, the Committee intends that any state prohibition apply only to areas designated for protection of public drinking water supplies, shellfish beds, and areas designated for body contact recreation." [emphasis added]

Senator Boggs at S 12040 in the Congressional Record:

> "This means that if water quality at a specific location would be degraded below applicable water quality standards by a discharge, treated or otherwise, the state may prohibit the discharge in that area to protect the lake, marina, oyster bed, or municipal water intake location.
>
> . . .
>
> It should be emphasized further that the language permits a discharge prohibition only when 'applicable water quality standards require such a prohibition.'" [emphasis added]

There are more examples that reiterate the same point (e.g., Senator Cooper, at S 12052): no-discharge areas were meant to be limited to those areas where applicable water quality standards require such a prohibition, particularly areas mentioned in the statements above. A larger no-discharge area could be permitted only if a state could prove that its waters were vulnerable to falling below applicable water quality standards due to sewage discharge from vessels.

$ $ $ $ $ $ $ $ $

TITLE: Definition of Navigable Waters

DATE: December 9, 1971

The question has arisen as to the scope of the term "navigable waters of the United States" as that term is used in Section 13 of the Federal Water Pollution Control Act concerning marine sanitation devices. Final Section 13 regulations will be promulgated shortly. The precise question posed is whether state inland waters which are "navigable in fact" but are not connected by navigable water with another state are nevertheless within the "navigable waters of the United States" if they are or might become part of an interstate transportation system including rail and automotive links.

Such waters have never been held to be within the "navigable waters of the United States", and the possibility of securing such a holding is remote. Thus, under current authority I conclude there must be a water connection between states, and Section 13 will not apply to inland lakes.

Other Statutory Applications of the Term "Navigable Waters of the United States"

In addition to Section 13 of the FWPCA, the term "navigable waters of the United States" is also used to define the scope of sections 10(a) (pollution abatement), 11 (oil spills), 12 (hazardous substances), and 21(b)(state certification) of the FWPCA as well as section 13 of the Rivers and Harbors Act of 1899.[1] The recently passed Senate amendment of the FWPCA (S. 2770) includes, for the first time, a statutory definition of navigable waters:

---

[1] Section 10(a) presents two peculiarities not found in the other provisions. First, Section 10(a) states that pollution occurring in "interstate or navigable waters" is subject to abatement. The section thus appears to literally cover non-navigable waters if they "flow across or form a part of State boundaries" [FWPCA §23(e)].

Secondly, Section 10(a) does not specifically refer to navigable waters of the United States but conditions the exercise of federal regulation upon a finding of interstate effect or consent of the Governor where the treatment in turn raises at least two further questions: (a) are state as well as federal concepts of navigability applicable, and if so, do they differ from one another, and (b) what is the constitutional effect of a Governor's request for, or consent to, EPA action under §§10(d)(1) or 10(g)(2) where solely intrastate pollution is sought to be abated and occurs in waters not navigable waters of the United States but "navigable in fact?"

These questions have received limited treatment in the literature, Clark, Water and Water Rights §247.1(c); Edelman, Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution, 33 Geo. Wash. L. Rev. 1067 (1965). However, in view of the likelihood that they will be mooted by the enactment of new legislation, I have not attempted to resolve them here.

"Section 502.

* * *

> (h) The term 'navigable waters' means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. (emphasis added) 2/

Although addressed primarily to the immediate problem of what EPA's position should be with respect to the coverage of the new vessel sewage regulations, this memorandum is also intended to provide a preliminary basis for evaluating the proper scope of coverage of the other statutory provisions noted above. In addition to the interstate connection requirement, at least one inquiry has been received from EPA Regional Offices requesting a definition of "navigability in fact" primarily for purposes of applying section 21(b) of the FWPCA. The Forest Service has asked the Region IX office to list all navigable waters within public lands administered by the Forest Service so that it may determine which Forest Service permittees must secure certifications from State agencies under section 21(b). The problems inherent in attempting to define "navigability in fact" for use in Regional offices will be treated in a separate memorandum.

Interstate Water Connection Requirement

No discussion of the meaning of "navigable waters of the United States can begin without quoting the bedrock definition of the term as enunciated over 100 years ago by the Supreme Court in The Daniel Ball, 77 U.S. 557 (1870):

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel in water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." (emphasis added). id. at 563.

2/Section 10(a) of the FWPCA and the Refuse Act both include tributaries of navigable waters of the United States within the waters covered if the discharge may reach either "navigable waters of the United States" (Refuse Act) or "interstate or navigable waters" (§10(a), FWPCA). FWPCA §§11, 12, 13 and 21(b) are silent in this regard.

The Daniel Ball definition thus seems to clearly establish an interstate water connection requirement within its definition of navigable waters of the United States as opposed to State navigable waters. Although this definition has been further refined, and considerably expanded, as to what constitutes "navigability in fact", United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), the Court's requirement of a connection between states "by water" has not been upset by later precedent. On the contrary, the requirement has occasionally been reinforced in the Supreme Court, though no case has directly presented the issue for decision. In Ex Parte Boyer, 109 U.S. 629 (1884), the Court found the Illinois and Lake Michigan Canal to be within the navigable waters of the United States, even though artificial and wholly within one state. The Court noted that no opinion was being expressed as to:

> ". . . waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between [States]. . ." id. at 632. (emphasis added).

Nineteen years later in The Robert W. Parsons, 191 U.S. 17 (1903), another inland canal case, the Court came closer to expressing such an opinion when it stated that by finding the canal to be within United States' navigable waters:

> "It is not intended . . . to intimate that if the waters, though navigable, are wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the State of New York, they are to be considered as navigable waters of the United States." id. at 28.

Subsequent Supreme Court and lower court decisions have treated the "navigability in fact" question rather than the Daniel Ball interstate water connection requirement. 3/ However, the question has arisen in numerous district and circuit court cases involving small craft accidents on inland lakes. These cases have uniformly held that the waters cannot be deemed navigable waters of the United States unless they are located upon a state or foreign boundary, e.g., Wreyford v. Arnold 477 P. 2d 332 (Ct. App. N.M. 1970) (Navajo Lake, New Mexico), or are connected with another state or country by navigable water, e.g., Madole v. Johnson, 241 F. Supp. 379 (W.D. La. 11965) (Lake Hamilton, Arkansas, formed by damming the Ouachita River), Loc-Wood Boats and Motors v. Rockwell, 245 F.2d 306 (8th Cir. 1957) (Lake of the Ozarks, Ark.). Surprisingly, in only one of these decisions was the argument ever advanced that interstate connection by land transportation is sufficient. In that case, Shogry v. Lewis, 225 F. Supp. 740 (W.D. Pa. 1964), federal jurisdiction was denied even though opposite shores of Lake Chautauqua, New York, were connected by an automobile ferry:

3/ (e.g., The Montello, 87 U.S. 430 (1875); United States v. Appalachian Electric Power Co., supra; Economy Light Co. v. United States, 256 U.S. 113 (1921); see also, Utah v. United States, 2 ERC 1759 (U.S. Sup. Ct., decided June 7, 1971); United States v. Utah 283 U.S. 64 (1931); United States v. Holt Bank, 270 U.S. 49 (1926); Rochester Gas & Electric Corp. v. Fed. Power Comm., 344 F.2d 593 (2d Cir. 1965).

> "It may be considered that interstate as well as domestic commerce moves on Lake Chautauqua.
>
> It seems clear, however, that this Court has no admiralty jurisdiction over Lake Chautauqua.
>
> * * *
>
> ". . . it is certain that the waters of Lake Chautauqua do not form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." id. at 742-743. 4/

Two cases which ultimately went to the Supreme Court discuss the possibility of utilizing the notion of interstate effect through rail and water links between states.

The first of the two cases, The Katie, 40 F. 480 (S.D. Ga. 1899), mandamus denied, In re Garnet, 141 U.S. 1 (1890), involved the constitutionality of a federal statute limiting liability for losses to vessel cargo. The statute extended to "all vessels used on lakes or rivers, or in inland navigation". It was challenged on the ground that by reference to "inland navigation" the statute sought to regulate "internal commerce" and so exceeded the bounds of the Commerce Clause. The facts of the case indicate, however, that the vessel, The Katie (which caught fire and lost most of her cargo), was engaged in carriage of goods between South Carolina and Georgia on the Savannah River which forms the border between those states. The parties seeking to avoid the statute virtually conceded that it was probably valid as applied to The Katie, but argued that by its breadth the statute would inevitably regulate internal commerce and so was void. The Court chose to treat this

---

4/Other boat accident cases noted wherein claims of navigability were rejected include: George v. Beavark, Inc. 402 F.2d 977 (8th Cir. 1968) Beaver Lake, White River, Arkansas; "float fishing" sole commercial use); Watring v. Unnamed Inboard Motor Boat No. WV4488AB, 322 F.Supp. 1226 (S.D. W.Va. 1971) (Sutton Reservoir, Elk River, W. Va.); In re Builders Supply Company, 278 F. Supp. 254 (N.D. Iowa 1968) (Clear Lake, Iowa; U.S. Rte. No. 18 passes close by: Doran v. Lee, 287 F. Supp. 807 (W.D. Pa. 1968) (Conneaut Lake, Pa.); Johnson v. Warthman, 227 F. Supp. 135 (D. Ore. 1964) (Lake of the Woods, Oregon; no significance that Lake located entirely within U. S. National Forest).

These cases may be subject to the distinguishing argument that the interest of the Court in protecting personal injury claimants from severe damage limitations imposed by the law of admiralty, together with the close affinity of the cases to traditional automobile negligence actions, resulted in holdings of non-navigability. Nevertheless, the holdings are in accord with the Daniel Ball formula and inevitably give it some strength regardless of the extrajudicial factors which may have been responsible for the results reached.

argument on the merits and sought to draw a distinction between "inland navigation" and "internal commerce" by focusing on the interstate destination of the goods. In aid of this argument the Court noted the interstate water connection required by the Daniel Ball and The Montello, but stated, at page 489:

> "It will be observed that this was the construction of a penal statute, and its application under the admiralty power. But for the regulation of interstate commerce . . . Congress has enacted legislation with reference to the commerce upon water routes whether they form by connection with other waters or with railways, a highway for continuous carriage or shipment of passengers or property. * * * If therefore, the navigable waters of a state wholly within the state, and with no exterior water connection, are yet utilized under 'common control, management, or arrangement,' in connection with railroads, for 'continous carriage' in other words, for interstate commerce, for the purpose of such commerce, they would become public waters of the United States, and subject to Congressional control under the commerce clause."

This reference to a rail-link connection was clearly unnecessary to sustain the application of the statute to The Katie and so is dictum. The Court's reference to a rail connection, in any case, appears to be an attempt to establish the necessary interstate character of carriage in some inland waters rather than redefine the scope of the "navigable waters of the United States", a term not used in the statute being examined.

Finally, the Court found that the statute was independently supported by the Admiralty Clause of the Constitution. This basis for upholding the statute was thereafter relied upon exclusively by the Supreme Court, with no reference in its opinion to the lower Court's possible challenge to the interstate connection requirement. The Supreme Court held that the federal limitation statute was validly passed by Congress as an amendment of the "general maritime law" and applied within the limits of the admiralty jurisdiction, without regard to the interstate character of the commerce being carried. As to maritime torts, the Court held that this jurisdiction is determined by locality of the tort within the "navigable waters." The Court then relied upon The Daniel Ball, The Montello and Ex Parte Boyer to describe the scope of those waters without suggesting any abandonment of the water connection requirement.

The only other challenge to the water connection requirement which was noted occurred in the dissenting opinion in United States v. Appalachian Electric Power Co., 107 F.2d 769 (4th Cir. 1939), rev'd, 311 U.S. 377 (1940). Judge Parker in his dissent argued that the New River between Virginia and West Virginia was "navigable in fact." Alternatively, he contended that since water commerce on the upper reaches of the New River (conceded by the power company to be navigable) reached other states by virtue of a rail connection, the river was used as a "highway for interstate commerce" and so was subject to federal regulation. Judge Parker acknowledged the water connection requirement in *The Daniel Ball*, but stated:

> "I do not think, however, that this statement was intended to limit the power of Congress over a stream which is in fact a highway of interstate commerce moving partly by rail. There can be no question as to the power of Congress over an intrastate railroad over which interstate commerce moves. *Colorado v. United States*, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878. And there can be no difference in principle with respect to a stretch of water wholly within a state which serves as a highway for interstate commerce. A different question would be presented if an intrastate stretch of water capable of use in interstate commerce had never been used for that purpose. Here, however, the waterway has been used in connection with a railway as a highway of interstate commerce and to that end has been improved by Congress through expenditure of moneys of the United States." *id.* at 806-807.

In reversing, the Supreme Court adopted the first of Judge Parker's arguments but again ignored the water connection problem. One may validly speculate that, in view of the obvious stretching of the concept of navigability which was taking place in *Appalachian Electric Power*, that the Court would have latched onto the notion of an interstate rail connection if there were any support for the theory in the Court, if not in the case law. Instead, the Court chose to rely upon the much less obvious theory of establishing navigability by showing "improvability" (given a reasonable relationship between benefits and cost). Neither this case nor *The Katie* has ever been cited for the proposition that the water connection requirement should be dropped.

In sum, existing authority for extending "navigable waters of the United States" to cover inland waters with an interstate land transportation connection is negligible, and there is substantial authority to the contrary. On the other hand, the issue has never been posed in a case brought under the FWPCA or the Refuse Act, and in view of the arguments which could be advanced in such a case as to the pervasive interstate impact (including commercial impact) of intrastate pollution, perhaps the water link requirement could not be eliminated. Yet Congress did choose, in the fact of the existing case law, to utilize the navigable waters rubric without inclusion of additional language indicating a desire to cover pollutive activities which "may affect interstate commerce" though not themselves originating in navigable waters of the United States. 5/ This choice, together with the emphasis on continued State participation in pollution control [cf. FWPCA §§10, 21(b)], does not favor an argument that, if accepted, and pushed to its logical conclusion, could virtually obliterate the notion of intrastate waters subject to exclusive State jurisdiction.

Also, once a land rather than water connection between States is considered, one must begin to catalogue the variations of connections which could be relied upon and the size of rivers, streams and lakes which could be involved. Assuming we do not wish to advocate a federal regulatory take-over of all water in the country, we would be forced to choose between modes of transportation (rail, land, air?) and perhaps make distinctions within those modes (e.g., interstate highways, federal vs. State highways; degree of usage; proximity to water; actual crossing vs. tangential routing?). Additional distinctions might be necessary to discriminate as to the size of the water body involved. Still further discriminations might then be made based upon commercial activity in or near the water body as an indicator of interstate economic involvement and perhaps the degree of pollution likely to be involved.

Thus, doing away with the land connection requirement presents practical as well as legal obstacles. Informal discussions with personnel in the General Counsel's Office of the Coast Guard and the Army Corps of Engineers indicate that the former is hesitant to attempt to cover inland water while the latter is entertaining some thought of covering "large" inland water bodies (e.g., the Salton Sea in California) without regard to water connection. Both recognize the legal impediments to such action.

Given this background as well as the practical application of the vessel sewage regulations with which we are presently concerned, I do not believe an effort to abandon the water connection requirement is presently warranted. The type of craft operating on inland lakes are unlikely to have any toilet facilities on board. Moreover, the issue seems to be politically sensitive (viz., Michigan Governor Milliken's request for a statewide "no discharge" zone), and so State regulation may well be forthcoming should any significant inland lake problem emerge.

5/ Compare section 23(b) of the Federal Power Act, which was recently relied upon by the Supreme Court to extend the FPC's jurisdiction to cover a pump-storage project to be located on non-navigable waters but which would transmit energy across state lines, FPC v. Union Electric Co., 381 U.S. 90 (1965). Though §21(b)(2) of the FWPCA does give a state whose waters are "affected" an opportunity to object to the issuance of a federal permit, there nevertheless must have been a discharge into "navigable waters of the United States" in the first place in order to activate the provisions of §21(b). Sections 10(a) and 10(c)(5) of the FWPCA, as well as the Refuse Act, do contain the notion of regulating a discharge into non-navigable waters if it may affect interstate or navigable waters of the United States. However, the discharge or harmful effect must be transported by water, and it is not enough to establish federal jurisdiction merely because of an interstate economic effect transmitted via land-based commercial activity.

Looking at other statutory applications of navigable waters of the United States, it should be borne in mind that inclusion of tributaries of United States' waters brings in about from 95% in close to 100% of the nation's waters by surface area (as estimated by personnel of Water Quality Standards Office). As noted earlier, tributaries are specifically included within the scope of the Refuse Act and FWPCA §10(d) enforcement conferences. They are also included within the definition of navigable waters in S. 2770 which would apply across the board to the FWPCA. In addition, even without specific statutory reference to tributaries there is authority for arguing that such waters may be regulated if any activity therein may affect navigable waters of the United States. 6/

Pursuance of the land connection theory could also conceivably push federal jurisdiction to close to 100% and might well cover a few significant bodies of water, at least in terms of size, which the tributary theory would miss (e.g., the Salton Sea). This additional margin, however, does not appear to justify the legal and administrative difficulties it presents. In any event, we should be able to preserve the option of attacking the water connection requirement should this judgment of the factual and administrative practicalities prove erroneous.

6/Cf., *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941) (". . . it is clear that Congress may exercise its control over the non-navigable portions of a river in order to preserve or promote commerce on the navigable portions." id. at 523); *United States v. 531.13 Acres of Land,* 366 F.2d 915 (4th Cir. 1966), *cert. den.* 385 U.S. 1025 (1967).

§ § § § § § §

TITLE: No-Discharge Exemption from the Federal Vessel Sewage Standard Under Section 312(f)(3)

DATE: January 18, 1973

Honorable William G. Milliken
Governor of Michigan
Lansing, Michigan 48903

Dear Governor Milliken:

Thank you for your letter of December13, 1972, outlining Michigan's program to control sanitary waste discharges from vessels. I am glad to hear of your vigorous efforts, and the high degree of compliance that you report.

Your letter inquires concerning the means by which Michigan may apply for a no-discharge exemption from the federal vessel sewage standard under section 312(f)(3) of the Federal Water Pollution Control Act, as recently amended. As you know, Section 312(f)(3) is operative only "[a]fter the effective date of the initial standards and regulations promulgated under [section 312]." Section 312(c)(1) provides that the initial federal standards and regulations shall be effective for new vessels two years after promulgation, and for existing vessels five years after promulgation. Accordingly, I do not believe that the exemption procedure of section 312(f)(3) is available until the two and five-year periods specified in section 312(c)(1) have elapsed. During these interim periods, since the federal standards and regulations are not yet in effect, Michigan's law in this area is not pre-empted under section 312(f)(1), and thus there is no real necessity for federal approval of no-discharge areas in Michigan.

We do not believe that section 312(f)(2) operates to change these conclusions. Section 312(f)(2) makes the federal standards and regulations effective immediately as to any vessel "equiped with a marine sanitation device in compliance with such standards and regulations." However, the federal standard, promulgated by EPA last June (37 F.R. 12391), is a no-discharge standard, and thus vessels in compliance with the federal standard should present no problem from the standpoint of Michigan law. To be sure, the EPA regulation included an incentive provision (§140.3(c)) giving a limited exemption from the no-discharge standard to vessels installing flow-through devices meeting certain requirements. However, we do not view §140.3(c) as part of the standard for purposes of section 312(f)(2), and accordingly we do not believe that §140.3(c) operates to preempt the Michigan law and create a necessity for a no-discharge exemption under section 312(f)(3).

§ § § § § § §

TITLE: Interpretation of Section 312 -- Vessel Sewage Regulations

DATE: January 16, 1973

Mr. Richard Schwartz
Executive Director
Boat Owners Association of
  the United States
1028 Connecticut Avenue
Washington, D. C. 20036

Dear Mr. Schwartz:

Mr. Ruckelshaus has asked me to respond to your letter of November 20, 1972, concerning the interpretation of section 312 of the Federal Water Pollution Control Act, as amended. Let me apologize for the delayed response; the questions you raise are difficult and required some time to resolve.

Your first question concerns the relationship between paragraphs (3) and (4) of section 312(f), both of which relate to special no-discharge zones. You note that paragraph (3) requires the Administrator to determine only the question of "adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels"; while paragraph (4) requires the Administrator to determine only the question of whether water quality requires a prohibition of any discharge. You ask whether the Administrator must also consider water quality requirements under paragraph (3), and the availability of adequate removal facilities under paragraph (4).

In my opinion, paragraphs (3) and (4) of section 312(f) must be read literally. Paragraph (3) requires the Administrator to determine only the question of availability of removal facilities, while paragraph (4) requires the Administrator to determine only the question of water quality. I would not read into the statute a requirement that the Administrator must also make a water quality determination under paragraph (3), and a "facility" determination under paragraph (4).

The Congressional intent was, I believe, fairly clear. Under paragraph (3), a State could establish a no-discharge rule for "some or all of the waters within such State"; in such event, pump-out facilities would clearly have to be available (since there might be no waters into which a discharge could be made). On the other hand, paragraph (4) provides for no-discharge zones covering "specified waters". This would presumably mean limited areas, such as shellfish areas or waters off public beaches, in which case pump-out facilities might not be necessary (since discharges might be permissible in other areas).

With respect to the question of water quality, I see no inconsistency between paragraphs (3) and (4) as written. Under paragraph (3) the State makes the water quality determination, while the Administrator makes this determination under paragraph (4). But in both cases, the determination must be made.

Your second question asks whether, during the five-year period before the effective date of the federal standard under section 312(c)(1) as to existing vessels, the States are precluded from prohibiting discharges from existing vessels which are in compliance with the federal standard. This question requires an interpretation of section 312(f)(2) as applied to the initial EPA standard published in the Federal Register June 23, 1972. As you know, section 312(f)(2) provides that the initial standards and regulations under section 312 shall become effective immediately (and thereby pre-empt State and local laws) with respect to any vessel equipped with a marine sanitation device "in compliance with such standards and regulations." EPA's initial standard prohibited any discharge. However, an exemption clause (§140.3(c)) was adopted providing that existing vessels equipped with a flow-through device meeting certain specifications would not be required to comply with the no-discharge standard for specified periods of time. This clause was intended to provide for immediate pollution abatement before the effective date of the Federal standard, in those States without their own regulatory program governing vessel sewage.

The position of the Environmental Protection Agency is that §140.3(c) is an exemption from the no-discharge standard, and that accordingly a vessel in compliance with this exemption is not "in compliance with [the federal] standards and regulations" for purposes of early Federal pre-emption of State and local law under Section 312(f)(2) of the FWPCA. This position accords with the original intent of the EPA standard, which was to provide for immediate pollution abatement in those States without their own regulatory program for abatement of vessel sewage, rather than to weaken existing State regulation. It also accords with the language of the EPA standard, which specifically designates §140.3(c) as an "exemption," and specifically states that a single "standard" is being adopted, rather than two standards. We do not read Section 312(f)(2) of the FWPCA to provide for early Federal pre-emption of State and local laws regarding vessel sewage upon compliance by any vessel with an exemption to the Federal standard.

§ § § § § § §

THE REFUSE ACT'S PERMIT PROGRAM

TITLE: Proposed Corps Regulations Concerning Permit Program Hearings

DATE: August 12, 1971

1. The Corps has expanded the scope of its proposed regulations governing permit program hearings. A memorandum Mr. Zener sent you on May 27, 1971, commented on the unacceptability of the earlier draft of the regulations, which concerned only hearings held when a state objected to the granting of a permit under section 21(b)(2) or (4), FWPCA. The new proposed regulations deal not only with those situations, but also with "any public hearing required before a Department of the Army permit can be modified, suspended or revoked".

As in the earlier proposal from the Corps, EPA's status at such hearings is that of a party (section 212(f)). The proposed regulations then provide that in hearings involving the permit program, the Corps will "consult with" EPA before making a decision (section 212(d)(2)). As to the weight to be accorded to EPA's views, section 212(d)(4) provides that in cases where a downstream state challenges the permit under section 21(b)(2) or the certifying state challenges the operation of the facility under section 21(b)(4), the decision of EPA as to the water quality standards in question is not binding on the Corps. The same subsection provides that as to all other cases, the EPA's decision shall be binding.

2. This format is deficient both as to the non-binding quality of EPA's advice in cases involving section 21(b) and as to EPA's status as a party to the hearings in which it also makes the decision. These problems are discussed below.

3. Subsections 21(b)(2) and (4) create procedures for hearing and decision by the federal licensing or permitting agency either when a downstream state objects to the granting of a permit (section 21(b)(2)), or when the certifying state, having certified the application for a non-operating permit or license (e.g., a construction permit), asserts that water quality standards will be violated by the method of operation of the permitted or licensed activity (section 21(b)(4)). Section 21(b)(2) further provides that EPA shall, at such hearings, submit "evaluation and recommendations" to the licensing or permitting agency; section 21(b)(4) has no similar provision.

The Corp's proposed regulations apparently reason that since 21(b)(2) and (4) flatly require the licensing or permitting agency itself to decide both whether water quality standards would be violated, and how on that account to condition the permit or license, given only to condition the permit or license, with EPA specifically given only an advisory role, then the permit policy of having EPA's decision on water quality matters be binding must yield to the specific requirement in section 21(b) that the licensing or permitting agency actually make the decision. This reasoning is not satisfactory.

Unquestionably, the reason why 21(b)(2) and (4) give responsibility for the ultimate decision on water quality standards to the licensing or permitting agency, with advice from EPA, is that Congress did not want to give one federal agency (at the time 21(b) was enacted, of course, the Department of the Interior rather than EPA was the pollution control agency) a veto power over the very broad range of activities for which various federal licenses and permits must be obtained from other federal agencies. The provision is a compromise between the Senate and House bills (see the Conference Report, H.R. Rep. No. 91-940, 91st Cong., 2d Sess. at pp. 51-58); the former would have given a bigger say to the Secretary of the Interior in all cases, and the latter would have given the state in which the discharge occurs the final say on certification (i.e., with no review of any kind by the Secretary and no provision for complaint by a downstream state).

This rationale does not apply to the permit program, where, at least theoretically, the Corps has stated that it is willing to cede to EPA what amounts to a veto power over Section 13 permits. If the Corps has accepted this result for the usual permit application process, there is no reason why it should strain at the delegation of its power also in those cases where a downstream state or a certifying state objects in the circumstances described by Section 21(b)(2) and (4). And as I have suggested, if the Corps is willing to have EPA make the decision on these questions, then, and for that reason, nothing in section 21(b) should prevent that course. (Whether the Corps has the power to delegate this function to EPA is another matter, but for the reason stated I do not think that section 21(b) bears that question.)

4. Mr. Zener discussed the basis of his objection to EPA's status as both party and decisionmaker under the earlier draft of the proposed Corps regulations in his memorandum of May 27. We have discussed this point further with both you and the Corps since, and those discussions have confirmed by belief that under either draft, any decision made by EPA on a permit application would be voided by a reviewing court on the ground that EPA is serving as judge in a cause in which it is also a party. I cannot imagine a more fundamental defect in a judicial or quasi-judicial proceeding.

Mr. Zener's May 27 memorandum proposes that an EPA hearing examiner attend hearings at which water quality matters are in issue, and that the EPA examiner make findings and conclusions on such matters, on the basis of which the Administrator would render his binding advice to the Corps. I still believe this to be much the best solution, as it would provide for a knowledgeable EPA representative, independent within the definition of the Administrative Procedure Act, to be present at the hearing, observe the witnesses, and address himself directly to water quality issues alone. Only this procedure could provide a firm basis for a binding EPA decision.

The reaction to this proposal has been to admit its rationality, but to point out that hearings at which two examiners would be present would be an anomaly and an unprecedented inelegance. But the anomaly and inelegance spring from the permit program itself, and cannot be cured without changing EPA's role in it. The permit program bifurcates decisions concerning permits into water quality and non-water-quality factors, and assigns the responsibility for the former portion to EPA and the latter to the Corps. If two such decisions are thus being made on each permit application, and if those decisions are to be made on the basis of a quasi-judicial hearing, then it is the height of logic to have both decisionmakers represented at the hearing. EPA's portion of the decision will be subject to strong attack if only the Corps has the procedural independence afforded by an APA hearing examiner.

To be sure, the presence of two hearing examiners can be expected to produce embarrassing moments and perhaps some undesirable results, but such effects will be more than compensated for by a successful program of pollution abatement. And I do not think it out of place to add that whatever embarrassment and unpleasantness are caused by having two hearing examiners will be as nothing compared to that caused EPA by a court decision, which would not be final until a year or two from now and after many many permit hearings had been held, that a major portion of the program is invalid for failure to comport with the most fundamental principle underlying the adversary legal system.

4. Accordingly, I recommend the following changes in the proposed regulations:

a. The deletion of the phrase "other than those standards on which the objection of the objecting state is based" from section 212(d)(4) on pages 5-6 of the draft (part of the phrase is repeated on page 6 of the draft, apparently inadvertently).

b. The following subsection 212(b)(3) should be added to section 212(b) (the present subsection (b)(3) would be redesignated as (b)(4), etc.):

> Recognizing the expertise of the Environmental Protection Agency in matters related to water quality, a hearing examiner appointed by EPA will attend all phases of hearings concerning permits under 33 CFR 209.131, the regulations for the Refuse Act Permit Program, and will, on the basis of the record made at such hearings, make written findings as to:
>
> (A) Where application for a permit is involved:
>
> (i) The meaning and content of applicable water quality standards;
>
> (ii) The application of water quality standards to the proposed discharge or deposit, including the likely impact of the proposed discharge or deposit on such water quality standards and related water quality considerations;
>
> (iii) The permit conditions required to comply with applicable water quality standards;

(iv) The permit conditions required to carry out the purposes of the Federal Water Pollution Control Act where water quality standards are not applicable in whole or in part;

(v) The protection afforded fish and wildlife resources by water quality standards, if any;

(vi) The interstate water quality effect of the proposed discharge or deposit;

(vii) The recommended duration of a permit; or

(B) Where the question of modification, suspension, or revocation of an existing permit is involved:

(i) Whether the terms of the permit have been violated;

(ii) The character and seriousness of the violation.

Based on these findings, the EPA hearing examiner shall make a written recommended determination as to whether or not the permit applied for should issue, or, in appropriate cases, where the permit should be modified, suspended, or revoked, along with the reasons for this recommended determination. Such determination, along with a transcript of the proceedings, shall be forwarded to the Administrator of EPA.

At hearings when a hearing examiner from the Army Corps of Engineers and one from EPA shall be present, the former shall preside. However, in order to insure the speedy and just conclusion of the matter, the presiding hearing examiner may delegate all or a part of his powers and duties as presiding officer to the EPA hearing examiner when questions concerning water quality are in the process of being heard and determined.

c. In the present subsection 212(b)(3), to be redesignated as 212(b)(4), the final three sentences should be deleted.

§ § § § § § §

TITLE: Army Corps of Engineers' proposed regulations governing permit program hearings where a downstream state has objected pursuant to section 21(b)(2) and (4) of FWPCA

DATE: May 27, 1971

1. The Corps's proposed regulations would provide that where a downstream state objects to the granting of a Refuse Act permit pursuant to section 21(b)(2), the Corps will hold a hearing on the application, which hearing will be conducted pursuant to the Administrative Procedure Act, 5 USC 551 et seq., and presided over by a hearing examiner. See section 1.3(a), (b). Under the proposed regulations, EPA is relegated to the status of a party at such hearings (section 1.4).

2. There are serious deficiencies in this proposed procedure. Under the permit program regulations, EPA is supposed to have the final say as to the environmental factors involved in permit applications. (33 CFR 209.131(d)(6)-(10)). The Corps's new regulations cover merely a special kind of permit program hearing -- i.e., those hearings on application for Refuse Act permits where a downstream state objects to the granting of a permit under section 21(b)(2) of FWPCA. Therefore, in the hearings covered by the proposed regulations, EPA is supposed to make the decision on environmental factors.

The difficulty is that the Corps has not provided for EPA's decision-making role in the proposed regulations. This means one of two things: (1) the Corps has -- advertently or not -- cut EPA out of the process of decision of whether a Refuse Act permit is to be granted in those cases where a downstream state objects pursuant to section 21(b)(2) of the FWPCA; or (2) EPA is to keep its decision-making role under the proposed regulations, and the Corps intends EPA to submit its decision to the Corps hearing examiner (in a step analogous to EPA's submitting a decision to the District Engineer under the permit program regulations (33 CFR 209.13(d)(7)).

That the first of these alternative results is unsatisfactory needs no discussion. The second is also unsatisfactory; while the hearing is supposed to be conducted with the procedural protection of the Administrative Procedure Act (including having an impartial hearing examiner), the decision as to environmental factors would actually be made by EPA -- one of the parties to the hearing. I have serious doubt as to whether a reviewing court would uphold this procedure.

Therefore, we should obtain the alteration of the proposed regulations by adding the requirement that a hearing examiner from EPA attend the hearing (though, in deference to the Corps, he should not preside), and make that portion of the decision dealing with environmental questions. Although this result would be somewhat inelegant, as it would require the use of two hearing examiners, I believe it to be necessary.

3. Accordingly, I suggest that the following changes be made in the proposed regulations. The second sentence of section 1.3(b) should be amended to read:

> Except as provided in subsection (c) below, the hearing examiner shall have authority [etc.] * * *.

In addition, the following subsection (c) should be added to section 1.3 (the present subsection would be redesignated as (d), etc.):

> Recognizing the expertise of the Environmental Protection Agency in matters related to water quality, a hearing examiner appointed by EPA will attend all phases of the hearing and will, on the basis of the record made at such hearings, make written findings as to:
>
> (i) The meaning and content of applicable water quality standards;
>
> (ii) The application of water quality standards to the proposed discharge or deposit, including the likely impact of the proposed discharge on such water quality standards and related water quality considerations;
>
> (iii) The permit conditions required to comply with applicable water quality standards;
>
> (iv) The permit conditions required to carry out the purposes of the Federal Water Pollution Control Act where water quality standards are not applicable in whole or in part;
>
> (v) The protection afforded fish and wildlife resources by water quality standards, if any;
>
> (vi) The interstate water quality effect of the proposed discharge or deposit;
>
> (vii) The recommended duration of a permit.
>
> Based on these findings, the EPA hearing examiner shall make a written recommended determination as to whether or not the permit applied for should issue, along with the reasons for this recommended determination.
>
> At hearings when a hearing examiner from the Army Corps of Engineers and one from EPA shall be present, the former shall preside. However, in order to insure the speedy and just conclusion of the matter, the presiding hearing examiner may delegate all or a part of his powers and duties as presiding officer to the EPA hearing examiner when questions concerning water quality are in the process of being heard and determined. Upon the making of findings by the EPA hearing examiner, those findings, along with the recommended determination, shall be adopted by the Corps of Engineers hearing examiner, and made a part of his recommended decision.

§ § § § § § §

TITLE: Confidentiality Clause in Permit Program Application Form

DATE: July 12, 1971

You have asked me for my opinion concerning the request by OMB that the Corps and EPA agree to honor any request for confidentiality made by industry as to information (other than effluent data) contained a permit program application form. The confidentiality clause in the present application form and the permit program regulations promises confidentiality for trade secrets, with the Corps making its own determination as to whether any particular item for which confidentiality is claimed is in fact a trade secret.

1. I do not think we can, under the Freedom of Information Act, agree to honor any request for confidential treatment; on the contrary, the Act would require EPA or the Corps to make an independent judgment as to whether the particular item of information for which confidentiality is claimed is entitled to confidential treatment. This is made clear by the decision in *Bristol-Myers Company v. Federal Trade Commission*, 424 F. 2d 935 (D.C. Cir. 1970). In that case -- a suit under the Freedom of Information Act to obtain certain records of the Federal Trade Commission -- the district court had dismissed the complaint on the basis of the Government's assertion that the documents contained confidential information, as well as other exempt material. The Court of Appeals reversed, holding that the district court should have inspected the documents to make its own determination as to whether they were entitled to confidential treatment. The Court of Appeals stated (424 F. 2d at 938-9):

> The first exemption cited protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist Government policy makers.
>
> *Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny.* The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent. The court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure. These judgments are possible only after careful consideration of the particular documents in question and it is for this detailed analysis that we remand. (Emphasis added).

Clearly, if a court has the independent responsibility to scrutinize the documents rather than accepting a claim of confidentiality by the Government, then the Government also has an obligation, when sued under the Freedom of Information Act, to make an independent determination as to whether the documents for which industry claims confidentiality are in fact confidential documents exempt from mandatory disclosure under the Freedom of Information Act.

2. However, at issue between us and OMB may be more than simply the question of whether the Government rather than industry has the final say on the confidential treatment to be accorded a particular item of information. There is also the question of whether confidentiality is to be confined to trade secret information or is to have a broader scope. The permit program regulations confine confidentiality to trade secret information. However, the Freedom of Information Act would allow us to keep confidential "commercial and financial information" provided it was of the sort that is customarily kept confidential. 1/ This could include a broader range of information than "trade secrets", which generally includes only information regarding formulas and manufacturing processes. See 79 C.J.S. pp. 935-6, defining "trade secret." The OMB position might require us, for example, to withhold from public disclosure such "commercial" information as the amount of output of a particular plant, although such information would not be a "trade secret" and thus would not be accorded confidentiality under the permit program regulations as they now read. Indeed, the very giving of a pledge of confidentiality by the Government would be a significant argument which the Government and industry could use in resisting disclosure under the Freedom of Information Act of non-trade secret information. 2/ Thus the giving of such a pledge for non-trade secret information as OMB appears to want could have legal effect, and the question of whether it should be given becomes a policy matter.

1/ See Sen. Rpt. 1219, 88th Cong. 2d Sess., at p. 6, discussing the exemption in the Freedom of Information Act for confidential information:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

2/ In the legislative history of the Freedom of Information Act, it was made clear that one of the purposes of the "confidential information" exemption was to enable the Government to honor good-faith pledges of confidentiality. See H. Rpt. 1497, 89th Cong. 2d Sess., at p. 10: "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

§ § § § § § §

TITLE: Legal Basis for Effluent Guidelines

DATE: August 9, 1971

SUMMARY

In my memorandum of July 6, 1971, I discussed the legal basis for effluent standards in the permit program on the basis of the generally prevalent theory that they are intended to define what constitutes the equivalent of secondary treatment, which is usually required by water quality standards. My memorandum pointed out the many difficulties in using the test of equivalence to secondary treatment as a basis for effluent standards.

I have now concluded that there is another basis in water quality standards that can serve as a justification for effluent standards, at least in the most serious situations we face -- those where the receiving water in question fails to meet applicable water quality standards.

With respect to discharges into receiving waters where no violation of standards can be established, I remain doubtful as to whether we have authority to impose effluent standards. However, assuming the correctness of the recent decision of the Court of Appeals for the District of Columbia in Calvert Cliffs Coordination Committee v. Atomic Energy Commission (which appears to require the Corps of Engineers to make an evaluation of environmental factors independent of that made by EPA), it seems advisable for EPA to participate in the Corps' determination at least to the extent of recommending compliance with effluent standards where there is no violation of water quality standards.

These matters are discussed below. I have attached a set of recommended instructions to the Regions on how to use effluent standards in dealing with permit applications. These instructions could be used whenever it is felt that the effluent guidelines have sufficient technical validity to be utilized as standards in passing on permit applications.

DISCUSSION

A. Authority for Affluent Guidelines Where Water Quality Standards are Violated

1. EPA's role in the permit program can be most easily justified in those cases where the discharge in question would be abatable under section 10(c)(5), FWPCA. For in such cases the Corps, by looking to EPA for conclusive advice, is taking the perfectly justifiable position that it will not issue a permit for a discharge which EPA considers to be in violation of the statute which EPA administers. If the discharge would in fact be subject to abatement under the FWPCA, then, also pursuant to section 10(c)(5), the court would take into account "practicability and physical and economic feasibility" in granting relief. In other words,

the court would order the abatement of the discharge to the best practicable and feasible level. Under the permit program, then, where a discharge would be abatable under section 10(c)(5), EPA has the power to require the Corps to condition a permit upon institution of the same level of treatment that would be required under section 10(c)(5): the best level of treatment that is practicable and feasible. This, as I understand it, is the level of treatment defined by effluent guidelines. Therefore, under the permit program, EPA can require the effluent guidelines to be met whenever the discharge in question would be subject to abatement under section 10(c)(5).

2. The foregoing serves to justify application of the effluent guidelines to any interstate waters which are not in compliance with water quality standards. In such a case, where a discharger's effluent contributes to that violation to any extent (this should be discernable from the permit application), then the discharge is subject to abatement under section 10(c)(5). It is no defense to an abatement action under section 10 (c)(5) for the discharger to assert either (1) that if the receiving water were otherwise pure the discharge in question would not, by itself, lower the receiving water below water quality standards or (2) that abatement of the particular discharge would not raise the receiving water quality above applicable standards (i.e., because other discharges would still be present and would be enough to cause the violation). In short, to obtain abatement under section 10(c)(5), EPA need only show that a discharge contributes to an existing violation, and need not show that the discharge causes the violation. */

3. Under the permit program, therefore, where an intrastate lake or stream is below water quality standards, every industrial discharger on the lake or stream whose discharge contributes to the violation may be required, under the permit program, to comply with the effluent guidelines.

B. Use of Effluent Guidelines Where no Violation of Water Quality Stanards Can Be Established

The foregoing asserts the legality of effluent standards only for discharges into substandard receiving waters. The problem remains as to what to do with discharges that represent less than the best feasible treatment but that are received into waters in which no violation of standards can be established. No wholly satisfactory solution within the permit program exists here. Non-degradation clauses may be used to require the best feasible treatment when a new discharge into above-standard waters is proposed or where existing discharges with a cumulative effect may degrade above-standard waters; and the effluent guidelines could define the minimum treatment

---

*/ This point is further elaborated in the attached memorandum prepared by Mr. Joseph.

that would satisfy a non-degradation clause. However, apart from the limited application of non-degradation clauses, there may be no substantial basis for the use of effluent standards as binding advice to the Corps in the permit program where no violation of water quality standards can be shown in the receiving water. There is a similar problem in justifying EPA's imposition of the effluent guidelines through the permit program to intrastate waters.

Despite our probable inability to bind the Corps in such situations, I believe that we should adopt a policy of giving the Corps non-binding advice in those situations where the waters are intrastate or where the question is whether to permit a less-than-adequate discharge into an intrastate lake or stream where no violation of water quality standards can be shown. This is especially true where that advice would simply be that EPA has established that there is a better effluent level that the discharger could feasibly put in service -- an effluent level that EPA routinely requires where there are substandard receiving waters.

The advisability of our following this course is underlined by the recent decision of the Court of Appeals of the District of Columbia in Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, (CADC No. 24, 839, decided July 23, 1971). That case holds that the NEPA requires the AEC to give independent consideration to environmental problems when considering whether, and on what terms, to grant a construction permit for a nuclear power plant. The court stressed that the AEC could not rely exclusively on state certifications under section 21(b), FWPCA, that the proposed plants would not violate water quality standards. It pointed out (and this is certainly true) that the fact that water quality standards will not be violated does not mean that there will be no environmental damage, and exhorted the AEC and other federal agencies to go beyond the question of whether standards will be violated, and to make their own weighing of environmental factors before determining to act, or to permit action to be taken. I emphasize again the court's holding that the NEPA requires the AEC to make an independent environmental determination.

The clear import of this decision, applied to the permit program, is that the Corps may not be satisfied with EPA's advice as to violation of water quality standards, and must make its own independent determination of environmental matters on permit applications. Moreover, the case seems directly to hold that if the Corps seems disposed to go no further than accepting EPA's advice on water quality standards, then by a citizens' suit the Corps may be forced -- as the AEC was forced -- to make its own independent determination. This result cannot be avoided.

Since the Corps will have to make independent determinations on applications for permits, I think that EPA's only choice is to advise the Corps beyond the question of water quality standards. That course is advisable from several viewpoints. First, EPA should appear able and willing to advise broadly on these matters beyond the admittedly limited question of whether water quality standards have been violated: we must remain the comprehensively expert federal agency on environmental matters. Second, the

Corps should be correctly advised on environmental questions that come before it, and EPA's knowledge would help it answer these questions properly. It is true that because the advice would not be binding we could not control the results, and to that extent it would not be our program. But it has now been held that in any event the Corps' decision on environmental matters is not to be limited to EPA's statement on water quality standards. And that being so, EPA should seek to participate as fully as possible in the Corps' decision. If our participation is of high quality, I expect that our recommendations would be persuasive and quite likely controlling as a practical matter, at least on court review.

A good place to start would be in the area of permits for discharges into intrastate waters and interstate waters where no violation of standards can be established. In such cases, EPA could state that while no standard appears to be violated by the discharge, yet there is a higher level of treatment that is technically and economically feasible and should be required under NEPA. The Corps would be hard put to refuse such a recommendation. Moreover, if EPA had done its homework, it is probable that no better feasible level of treatment would be demonstrable. This would not be as good as having our own way by statute or executive reorganization, but it is better than merely observing while the Corps makes its independent judgment.

§ § § § § § §

TITLE: Legal Requirement Necessary to Obtain Abatement of Pullution
Under Section 10(c)(5), FWPCA

DATE: August 9, 1971

In order to establish that a particular discharge into interstate receiving waters is subject to abatement under section 10(c)(5) of the FWPCA, it is not necessary to show that the discharge in question is causing or would (in the absence of other discharges) cause a violation of water quality standards. It need only be shown (1) that the receiving water in question does not meet an applicable water quality standard or standards, and (2) that the discharge sought to be abated contributes (to no matter how small an extent) to that violation. (N. B. It is of course also necessary either to establish interstate affect or obtain the governor's consent; section 10(c)(5); 10(g)(1) and (2)).

This conclusion is supported both by the terms of section 10(c)(5) and by the practicalities of pollution abatement. Section 10(c)(5) provides that:

> The discharge of matter into such interstate waters or portion thereof, which reduces the quality of such waters below [applicable] water quality standards * * * is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that at

> least 180 days before such abatement action is initiated * * *, the [Administrator] shall notify the violators and other interested parties of the violation of such standard. * * *

This section arguably means that where a receiving water does not meet water quality standards, then any individual discharge which is a part of "the discharge of matter" that has caused the violation is subject to abatement. The section does not require that an abatement action, to be maintainable, must be directed against the entire discharge that has caused the violation; rather it provides that all of the discharge or discharges responsible for the violation are subject to abatement. (That the section recognizes that more than one individual discharge may be involved is shown by the use of the term "violators.")

Section 10(g)(1) and (2) (made applicable by the terms of section 10(c)(5)) add further weight to this conclusion. Both (g)(1) and (g)(2) use the phrase "discharge or discharges (causing or contributing to such pollution)" in referring to the discharges that are abatable.

Any other reading of section 10(c)(5) would make its use in pollution control far more difficult and far less sensible than Congress could have intended. In the Houston Ship Channel, for instance, it would be extremely difficult to determine whether the discharge from, say, U.S. Plywood-Champion Papers, Inc., would cause a violation of the BOD standard if none of the other approximately 240 present dischargers of BOD in the Channel were doing so. Nor would that be a rational inquiry, considering the present problems in the Channel. By the same token, the abatement of Champion Papers' daily discharge of 18,348 pounds of BOD by itself would almost certainly not cure the BOD problem in the Channel, as there would still be about 250,000 pounds of BOD dumped daily by the other dischargers. Despite this, there should be no question that a section 10(b)(5) action against Champion Papers alone could be sustained (and if Champion Papers were, say, the leading resister to voluntary abatement, it might well be both wise and necessary to single it out).

That a particular receiving water does not meet water quality standards is fairly easy to establish, and it is even easier to show that a particular discharge contributes in some degree to an established violation. Indeed, permit applications, without more, should establish the latter.

I believe that the recognition and use of this approach to section 10(c)(5) can have at least two important effects. First, since EPA's power to give binding advice to the Corps in the permit program is most strongly defensible where an actionable violation of water quality standards is involved, EPA can give such binding advice on permits for all dischargers who contribute to any extent to a violation of water quality standards in an interstate receiving water. This should cover perhaps the most serious instances of pollution.

Second, this reading underscores the effectiveness of section 10(c)(5) itself as a pollution abatement tool. For instance, in the case of a river which unquestionably violates water quality standards at some point, it should be possible to go upriver of that point and serve 180-day notices upon as many dischargers as necessary to clean it up, establishing merely that they contribute to any degree to the violations. It seems to me that the dischargers who did not than comply would have a difficult time in defending an abatement action (and a single lawsuit could name them all).

§ § § § § § §

TITLE: Effluent Guidelines and the Permit Program

DATE:

As you know, this Agency has for some time been involved in the development of effluent guidelines for certain basic industries. As these guidelines were first developed, it was felt that they did not have sufficient technological justification to be utilized as requirements in determining whether applications for permits from the industries covered should be granted or denied, and for determining how permits that are granted should be conditioned. However, after further technological review, we have now arrived at the point where we believe that these guidelines, as they are issued, can be used in the administration if the permit program in accordance with the following:

1. Where the receiving waters are interstate and are below applicable water quality standards, under the law all dischargers whose effluent contributes to the violation -no matter how small a percentage contribution any particular discharge may take -must abate the pollution to the extent that such abatement is practicable and physically and economically feasible (see section 10(c)(5), Federal Water Pollution Control Act). The effluent guidelines define the best level of treatment that is practicable and physically and economically feasible for the industries covered. Accordingly, the level of treatment specified in the effluent guidelines will be required as a permit condition for any industry to which the guidelines apply and which is discharging an effluent into interstate waters that contributes to the failure of the receiving water to meet water quality standards.

2. Where the quality of the receiving waters is above applicable water quality standards, virtually every State has a non-degradation standard, which provides, in relevant part, that the quality of such waters shall not be degraded unless the discharger can fulfill a number of requirements, including the requirement that he provide the best practicable treatment under existing technology. The effluent guidelines describe what the best practicable treatment under existing technology is for the industries covered. Accordingly, in any State where there is a non-degradation standard, new discharges, and present discharges which have

a cumulatively worsening effect on the receiving water (such as a discharge into a slowly flushing lake), will be required under the permit program to meet at least the level of treatment specified in the effluent guidelines.

3. Where the receiving water is interstate, or the quality of the receiving waters is above water quality standards and a non-degradation standard is not applicable, EPA's submission to the Corps (see 33 CFR 209-131 (d)(7)) should advise of any effluent guideline that may apply to the discharger and recommend that issuance of a permit be conditioned on compliance with that standard. EPA's advice in such a case will not be binding in the Corps, but we anticipate that the Corps will give such advice serious consideration.

4. In any particular case, a permit applicant may produce evidence tending to show that compliance with the effluent guidelines is not practicable. By the same token, in particular cases it may be that a better level of treatment than that represented in the guidelines is practicable for a particular applicant. In such cases, you will be required to consider whether, in light of the evidence presented and in light of your professional judgment, a deviation from the guidelines should be authorized under the permit program. However, absent such evidence, the guidelines will govern.

§ § § § § § §

TITLE: Effluent Guidelines--Suggested Amendment to Preamble

DATE: July 6, 1971

SUMMARY AND RECOMMENDATION

The effluent guidelines that are presently developed for eighteen basic industries have generally been referred to in our Agency as "guidelines," and they are so denominated in the present draft being proposed for publication in the Federal Register. However, I am concerned that some of the language in the preamble to the draft takes it beyond the guideline concept and might be used as a justification for the regions to impose these guidelines as absolute regulatory requirements, to be applied to each permit application from the industries in question without the exercise of any independent professional judgment as to the requirements necessary to preserve and enhance water quality. If the guidelines are applied in this fashion, the courts will disregard our use of the label "Guidelines" and test their validity in terms of whether we have the legal authority to impose effluent levels as absolute regulatory requirements. For the reasons discussed below, I have grave doubts as to the existence of such authority in EPA. Consequently, I recommend (1) that the preamble to the guidelines be changed to reflect clearly their status as guidelines rather than absolute regulatory requirements, and (2) that at the appropriate time, the regions be cautioned that these guidelines do not preclude the use of independent professional judgment in determining the treatment levels required for each individual permit applicant.

Specifically, I would amend the first full paragraph on page 3 of the draft, to read as follows:

> The proposed effluent guidelines define a minimum level of treatment and/or control. Higher levels of treatment will be required, where necessary, to meet water quality standards. These guidelines are intended as aids to the officers of the Environmental Protection Agency in the discharge of their duty under the Refuse Act permit program to advise the Corps of Engineers with respect to "the meaning, content and application of water quality standards applicable to a proposed discharge or deposit and as to the impact which the proposed discharge or deposit may or is likely to have on applicable water quality standards and related water quality considerations, including environmental values reflected in water quality standards." 33 CFR 209.131(d)(7). These guidelines are not intended to replace the exercise of independent professional judgment by the appropriate officers of the Environmental Protection Agency as to the level of treatment required in any particular case by applicable water quality standards and related water quality considerations.

DISCUSSION

It is necessary to insure that the effluent guidelines are applied as guidelines, since if they are applied as absolute regulatory requirements, there is a substantial danger that they would be set aside on the ground that EPA has no authority to issue such regulations.

It is clear that the President does not have general power to transfer decision-making authority from one agency to another. The Reorganization Act, 5 U.S.C. 901 et seq., specifies the method whereby functions may be transferred from one agency to another; and it is clear that the President cannot transfer decision-making authority from one agency to another without complying with the Act. See Federal Trade Commission v. Textile and Apparel Group, et al., 410 F. 2d 1052 (D.C. Cir.), in which court enunciated "the general principle that authority committed to one agency should not be exercised by another." The court went on to state:

> The reason for this is that Congress delegated to one agency certain authority, perhaps because it feels that agency is the most capable of exercising it * * *. The proper place for interested parties to get a different agency * * * to handle the job is back in Congress. 410 F. 2d at 1057-8.

Consequently, although the Corps of Engineers has authority under the Refuse Act to promulgate effluent standards as absolute regulatory requirements, such authority could not be transferred by executive order to EPA; EPA's issuance of regulations establishing effluent requirements must derive from some statutory authority residing in EPA. This conclusion is fortified by Section 21(b) of the FWPCA, in which Congress specifically granted EPA an advisory role--but not a decision-making role--in connection with Federal licenses for discharges into navigable waters. For EPA to assume the authority to impose effluent levels as absolute regulatory requirements would clearly go beyond the advisory role delineated in Section 21(b).

There are two possible sources of authority in EPA's statutes for the imposition of effluent levels as absolute regulatory requirements: 1) the requirement in Section 10(h) of the FWPCA that consideration be given to "the practicability and the physical and economic feasibility" of securing abatement of pollution; and 2) the requirement in many water quality standards that industries install "the equivalent of secondary treatment." Both of these facets of the FWPCA have been referred to in the preamble of the effluent guidelines. However, I do not think they would be adequate as a legal basis for EPA's imposing the guidelines as absolute regulatory requirements.

The reference to "practicability" and "physical and economic feasibility" in Section 10(h) is inadequate. Section 10(h) is not a grant of power to EPA to require as a minimum the best waste treatment that is practicable and feasible. Instead of specifying the minimum treatment that a discharger must have regardless of water quality standards (as our effluent guidelines purport to do), Section 10(h) indicates that what is practicable and feasible is the maximum that can be required under the FWPCA to correct a violation of water quality standards. Section 10(h) is thus the logical opposite of our effluent guidelines and may even be cited as authority for their invalidity if imposed as absolute regulatory requirements.

Nor is it satisfactory to argue that EPA may impose effluent levels as absolute regulatory requirements in the guise of the defining what is meant by "the equivalent of secondary treatment." In the first place, the coverage of Federal-State water quality standards under the FWPCA is limited to interstate waters, and many permit applications will come from industries discharging into intrastate waters. Moreover, there are at least seventeen States whose water quality standards do not impose a general requirement of secondary treatment on industry; and in those States which do impose this requirement, it is sometimes qualified by a definition of secondary treatment which we have approved and which may not be consistent with the effluent guidelines. 1/ In addition, it must be remembered that water quality

---

1/ Mr. Rogowsky has prepared the attached memorandum and chart summarizing the water quality standards that have been adopted with reference to secondary treatment for industry.

standards are not exclusively Federal, but rather are State-Federal standards. Accordingly, there is serious doubt as to whether we have authority to engage in the extensive "interpretation" that the effluent guidelines represent--and then to impose this "interpretation" as an absolute regulatory requirement--without following the State-Federal conference procedure that is required for a revision of water quality standards initiated by the Administrator. This is especially the case with respect to parameters of industrial discharge other than BOD and suspended solids, since the concept of secondary treatment has traditionally applied only to BOD and suspended solids. Thus any effluent levels required of industry with respect to other parameters would probably be viewed by the courts as amendments to water quality standards rather than interpretations of the term "equivalent of secondary treatment." And as amendments, they could not be adopted without following the procedure required for amending water quality standards.

Finally, as you know, there is serious doubt as to whether we have the authority to approve or adopt water quality standards under the FWPCA that impose effluent levels as an absolute requirement, irrespective of the condition of the receiving waters.

For all these reasons, I think we should make it clear, both in the preamble to the guidelines and in our instructions to the regions, that the guidelines are only guidelines for the exercise of professional judgment in each particular case, and are not intended to dispense with a necessity for the exercise of such judgment in light of the facts of each individual case.

§ § § § § § §

ENFORCEMENT CONFERENCE

TITLE: Enforceability of Recommendations of the Administrator of EPA following an Enforcement Conference Authorized under Section 10, FWPCA

DATE: June 11, 1973

Mr. John A. Pickens
King & Spalding
2500 Trust Company of Georgia
Building
Atlanta, Georgia 30303

Dear Mr. Pickens:

This is in response to your inquiry concerning the enforceability of recommendations of the Administrator of the Environmental Protection Agency [1] following an enforcement conference authorized under section 10 of the Federal Water Pollution Control Act (FWPCA), as in effect prior to October 18, 1972, when the Federal Water Pollution Control Act Amendments of 1972 were enacted. Under Section 10, the Administrator was authorized in cases of interstate pollution, and in certain other situations, to call a conference of the water pollution control agencies of the States involved. Following the conference, the Administrator was authorized to issue recommendations for remedial action, with a time schedule for such action.

The recommendations themselves, however, were not directly enforceable under the FWPCA. Instead, the Administrator was authorized to convene a Hearing Board, which would have the power to consider the matter on the basis of evidence presented at a public hearing, and to make recommendations to the Administrator concerning necessary remedial measures. In the event of non-compliance with these recommendations, the Administrator was authorized to request the Attorney General of the United States to bring suit to abate the pollution. After a de novo trial, the court was authorized "to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require."

It may be seen that the recommendations of the Administrator (or the Secretary) following a conference were not of themselves enforceable under the FWPCA. However, these recommendations have been widely regarded as based upon thorough consideration by the States involved and by the Federal government of needed abatement measures. They will, therefore, be carefully considered by the Environmental Protection Agency in issuing permits under section 402 of the Federal Water Pollution Control Act. Data developed at an enforcement conference may, for example, assist in determining the effluent limitations needed to attain water quality standards, the effluent limitations which would constitute the best practicable control technology currently available for a discharger or class of dischargers, and the feasibility of interim compliance schedules.

---

[1] By its terms, the Federal Water Pollution Control Act assigned responsibility under section 10 to the Secretary of the Interior. However, the Secretary's functions in this regard were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970.

Moreover, section 510 of the Act reserves specifically to the States the right to establish more stringent control requirements upon dischargers than those under the Act. Accordingly, when a State proceeds under its own laws against a discharger, nothing in the Federal Water Pollution Control Act stands as a bar to such an action unless the State attempts to enforce control requirements less stringent than requirements established under the Act. In this connection, it might be noted that, where an independent basis exists in State law for enforcement of requirements which are also embodied in enforcement conference recommendations, the deletion from the Federal Water Pollution Control Act of provisions for implementing these recommendations in no way precludes the State from proceeding under its own laws.

I trust that this will clarify our view of the law on this point. If we can be of further assistance, please do not hesitate to ask.

OPINIONS BASED OF FEDERAL ENVIRONMENTAL PESTICIDE CONTROL ACT (1972) (FEPCA)

TITLE: Implementation of Federal Environmental Pesticide Control Act

DATE: December, 1972

FACTS

The new pesticide law, amending the FIFRA, was enacted on October 21, 1972. The recitation in the new law that it is to be effective immediately is hedged with a number of exceptions. One such exception (Section 4 (c)(1) is unclear both with respect to the matters covered and with respect to the permissibility of accelerating the effective date involved. Another provision (Section 4 (a)) indicates that the sections of the amended FIFRA which are intended to be effective upon enactment do not become effective "if regulations are necessary for implementation;" instead, the Act provides that in that circumstance the necessary regulations "shall be promulgated and shall become effective within 90 days "from enactment of the new law, i.e., by January 19, 1972.

QUESTIONS PRESENTED

1. (a) Does Section 4(c)(1) of the Act defer the effective date of the requirement that "intrastate" pesticides be registered?

   (b) May the Agency accelerate the promulgation and effectiveness of regulations for registration and classification under the new law, or must it wait the "two years" specified in Section 4(c)(1)?

2. (a) For which provisions, otherwise effective upon enactment, are regulations "necessary" for implementation, so that such regulations must be promulgated within 90 days?

   (b) For which other provisions of the Act should regulations be promulgated within 90 days so as to gain the advantage, in any subsequent judicial proceedings, of the doctorine that great weight must be accorded to an Agency's contemporaneous constriction of a new law?

3. What type of "notice of proposed rule making" may be utilized under the Administrative Procedure Act with respect to those regulations which the agency does plan to issue in 90 days?

ANSWERS

1. (a) While in my opinion the answer is not at all clear, a legitimate argument can be made that the requirement for registration of intrastate pesticides is not effective immediately but can be deferred for two years.

(b) The legislative history of the Act makes it clear that the Agency need not wait the "two years" specified to promulgate regulations under the new registration and classification standards and to begin registering intrastate products and other new applications under those standards.

2. (a) Ninety-day regulations are necessary for the implementation of the provisions set forth in Part A of the attached Appendix.

   (b) Ninety-day regulations should be issued with respect to the provisions set forth in Part B of the attached Appendix.

3. In connection with the publication of a notice of proposed rule making, the Administrative Procedure Act establishes the option of publishing either (1) the terms of the proposed rule or (2) a description of the subjects and issues involved. In view of the extremely short time period involved, the Agency should consider issuing, as its proposal, only a description of the subjects and issues involved, rather than the precise terms of each regulation.

DISCUSSION

1. Meaning of Section 4(c)(1). Among the important changes effected by the new pesticides law are (1) the extension of federal regulatory control to products which are formulated and used within a single State ("intrastate pesticides") and (2) the establishment of new standards for the registration and classification of all pesticides. The new law provides generally that the amendments made thereby are effective on the date of enactment (or within 90 days thereafter, if regulations are necessary for implementation), but then establishes a number of exceptions to that general rule. While the meaning of certain of the exceptions is quite clear, _/ one of the provisions raises two questions. Specifically, Section 4(c)(1) of the new law states:

> Two years after the enactment of this Act the Administrator shall have promulgated regulations providing for the registration and classification of pesticides under the provisions of this Act and thereafter shall register all new applications under such provisions.

The question of when the requirement of registration must be implemented as to intrastate pesticides turns on an interpretation of Section 4(c)(1), _/ for there is no other provision that might defer that requirement. This same provision also raises the question of whether its "two-year" requirement (which is plainly applicable to the standards for registration and which may be applicable to the registration of intrastate pesticides) can be accelerated. Each of these questions is discussed below.

_/ For example, Section 4(c)(2) indicates that reclassification of previously registered pesticides under the new standards must take place after two but within four years. Similarly, the time periods for the certification of applicators set by Section 4(c)(4)(A), (B) and (C), are quite clear, as is the one-year delay in making effective any regulations relating to the registration of establishments, permits for experimental use and the keeping of books and records (Section 4(c)(5)).

a. *Intrastate Products.* My initial reading of the Act and its legislative history led me to the conclusion that intrastate products were intended to be subject to the registration requirement immediately (subject to the proviso referred to in fn., *supra*), I based this conclusion on the distinction I perceive in both the old and new laws between (1) the requirement that a product be registered and (2) the standards which must be applied in acting upon a request for registration. In light of that distinction, and since no regulations are needed to establish or implement the self-executing *requirement* of registration, I viewed the deferral of the promulgation of *regulations* effected by Section 4(c)(1) narrowly, *i.e.*, as deferring the promulgation of *standards* to be applied in the registration and classification process but not deferring the *requirement* of registration. In other words, I read the phrase permitting deferral of "regulations providing for the registration of an classification of pesticides under the provisions of this Act" as simply covering the standards to be applied to applications received. If this interpretation were accepted, the *requirement* for registration would be established by the FIFRA as newly amended (and would cover intrastate pesticides) while the *standards* for ruling on all new applications (interstate and intrastate alike) would remain those set by the old FIFRA (each of the provisions of which, by the terms of the new act, remains in effect until superseded).

This interpretation is supported by the somewhat sparse early legislative history. Thus the Senate Agriculture Committee Report (S. Rep. 92-838, June 7, 1972) explained (p. 18) that Section 4(c)(1) made an "exception to immediate effectiveness" such that "all new registrations of pesticides after such regulations are promulgated shall be in accordance with regulations governing registration and classification promulgated within two years of enactment of this Act." This explanation does not express any intent to defer the registration

---

_/ One other provision does affect the timing of the availability of sanction for non-registration of intrastate products. Section 4(d) provides that no penalty may be imposed for any act or failure to act occurring within 60 days after the Administrator has issued regulations and taken such other action as may be necessary to permit compliance. In other words, regardless of when the registration requirement for intrastate products becomes effective, no penalty for non-registration can be invoked until after the putative registrants have been given the opportunity to apply for registration.

requirement, but simply indicates that the new standards to be applied to applications will be deferred. The old standards remain available to be applied to all new applications received before the new standards are effective._/

On the other hand, I cannot say that it is unreasonable to read Section 4(c)(1) and the committee report as reflecting an intention to tie registration requirements and registration standards together, referring each for the two-year period. Moreover, this broad deferral does not create the administrative problems that would result if intrastate products were required to be registered now under the standards for registration set by the old FIFRA, then reregistered and reclassified after the new standards were promulgated. In view of the apparently large number of those products, it can be argued that Congress--had it thought of the problem--would probably not have intended this dual processing of intrastate products.

The lack of clarity in the statutory language and early legislative history was confirmed by the events just prior to final passage. Recognizing that the Congressional intent was not clear, Errett Deck wrote to the conference committee requesting resolution of the matter. He stated that subjecting intrastate products to immediate registration would be an "impossible requirement," that a "two-year interval" was necessary, and that the conference report "should clarify" that intrastate pesticides were to be registered only after the new standards referred to in Section 4 (c)(1) were promulgated. In response, the conference report, in the course of discussing Section 4(d) of the law--which makes penalties effective only after the Administrator provides persons with the opportunity to comply (see fn., supra)-- indicated that it had application to the situation presented by intrastate products. Thus, states

---

_/ The history of the appropriations section of the Act may cast some light on the problem. The House version of the bill, passed in November 1971, as well as the version reported by the Senate Agriculture Committee in June 1972 (Section 26) contained an open-ended authorization for appropriations, and the Act eventually reflected that type of provision (Section 27). However, the Senate Commerce Committee version, reported on July 19, 1972, substituted an authorization for appropriations not to exceed $15 million for fiscal 1973, $25 million for fiscal 1974, and $35 million for 1975. The Commerce Committee explained (S. Rep. No. 92-970, July 19, 1972, p. 45) that it had agreed with EPA's "cost estimates*** for new activities required by the bill "of" $15 million in FY 1973, $22.3 million in FY 1974, and $30.8 million in FY 1975." (emphasis added) The version of the bill which eventually passed the Senate authorized appropriations of $40, $52, and $64 million in the three fiscal years. These new figures, were suggested in the substitute bill worked out by the two Senate committees, and I am advised that part of the increase over the earlier figures was attributable to the inclusion of the sums that would have been required to continue to conduct "old" activities.

I have not yet been able to obtain any details of the "EPA cost estimates" which were used to justify the sums authorized for "new" activities. Those estimates would furnish persuasive evidence--one way or the other--on the intent of Congress concerning the registration of intrastate pesticides, for certainly the timing of implementation of that sizeable task would have had a significant impact on the cost estimates.

the report, "Section 4(d) makes it clear "that intrastate products" would be provided an opportunity to register under the federal law before their distribution would be prohibited."

No one would take issue with that proposition. However, that proposition flows from Section 4(d), not from Section 4 (c)(1). But before stating that proposition, the conference report, having just mentioned intrastate pesticides, referred to Section 4 (c)(1), stating that it "gives the Administrator up to two years to promulgate regulations providing for registration of pesticides under the provision of H. R. 10729." Taken as a whole, this passage might well have been intended to reflect not just that intrastate products were to be given the opportunity to be registered before penalties were imposed, but also that they were not to be required to be registered until the new standards were promulgated.

In the presence of these conflicting views, both of which are supported by legitimate arguments, I cannot advise you that you are bound by the law to follow a particular course, or even that one interpretation is far better supportable than another. Moreover, with the matter in doubt, you are likely to be sued regardless of which interpretation you adopt. That is, if you elect to defer the registration requirement, an environmentalist group might bring suit seeking to require the Agency to regulate intrastate products now; if you impose such regulation now (prior to the issuance of the new standards for registration), the industry can test your decision either by suing the Agency directly or by invoking their arguments as a defense to any enforcement action attempted to be taken.

In these circumstances, you are free to base your decision on what, in your estimation, is the policy which will best effectuate the purposes of the Act and is in the nation's and the Agency's best interests. I would add only that, if your decision is to defer the registration requirement, you may be able to avoid litigation by indicating at the same time that you do not intend to utilize the entire two-year deferral period to issue regulations (as I discuss in point b below, this option to accelerate the two-year period is open to you). By following this course, you would minimize the delay which would result from a rejection of the view that intrastate products must be registered immediately. Naturally, the probability that an environmental group would initiate litigation is directly related to the length of delay anticipated.

b. Acceleration of two-year period for promulgating regulations.

As noted above, section 4(c)(1) of the act provides that "two years after the enactment of this Act the Administrator shall have promulgated regulations providing for the registration and classification of pesticides under the provisions of this Act and (thereafter) shall register all new applications under such provisions." Even though the word "within" does not appear at the beginning of this sentence, the use of the future perfect tense --"shall have promulgated"--implies that the regulations can be promulgated in less than two years. However, it is not clear from the context of the sentence whether the word "thereafter," which governs the time of implementation of the regulations, refers to "two years" or to the time, within two years, at which the regulations are promulgated.

The legislative history of the provision makes it quite clear, however, that acceleration of both the promulgation of the regulations and the registration of applications under those regulations is permitted. Specifically, the House Agriculture Committee report (H. R. Rep. No. 92-511, p. 18), after stating that "all new registrations of pesticides shall be in accordance with regulations governing registration and classification promulgated within two years of this act, "goes on to state that "all registrations existing prior to promulgation of the above regulations shall be re-registered and classified in accordance with those regulations after two years but within four years of enactment of the Act" (emphasis added). The Congressional intent that the regulations can be promulgated and made effective in less than two years is further confirmed by the conference committee report (H. R. Rep. No. 92-1540, pp. 33-34) which states that the Administrator has "up to two years to promulgate regulations providing for registration of pesticides" under the new law.

I need add only that the opinion that the two-year period can be accelerated finds additional support in the language used in another effective date provision. Specifically, Congress, in setting a one-year period in Section 4(c) (5) for regulations relating to the registration of establishments, permits for experimental use, and the keeping of books and records, stated quite clearly that one year after enactment "the Administrator shall have promulgated and shall make effective" such regulations (emphasis added). In other words, when Congress wished to defer the effective date of regulations it knew how to use language accomplishing that result. No such language was utilized in section 4 (c)(1). Therefore, you have the flexibility to accelerate the two-year period for the issuance of the new standards for registration (and for the extension of the Act to intrastate products, if you determine that the Agency will not take the position that such extension is effective immediately).

2. "Necessary" Regulations.

Certain provisions of the new law are effective immediately, subject to the proviso that "if regulations are necessary for the implementation of any [such] provision" the regulations must be promulgated within 90 days from the date of enactment of the Act (section 4(a)). The question that arises is, for which immediately effective provisions are regulations "necessary". Of course, there are very few statutory provisions which are implemented by administrative agencies without the prior promulgation of some sort of regulations. Yet, strictly speaking, such regulations are not necessary, although they might well be appropriate. Accordingly, in order that the Act's use of the word "necessary" retain some meaning, we should distinguish between those provisions for which regulations are truly mandatory -- i.e., the Act expressly requires regulations or the provision cannot fairly be implemented without regulations -- and those for which they are merely permissive or appropriate. Those provisions for which regulations are merely appropriate become effective immediately upon enactment of the Act. We should so state at the earliest opportunity. This is not to say, however, that we should not issue regulations covering those provisions. There is a well-recognized doctrine in administrative law that the courts will give great weight to an agency's contemporaneous construction of a new statute. See, *e.g.*, *Udall v. Tallman*, 380 U. S. 1, 16. We can take advantage of that doctrine by issuing, wherever possible, "appropriate" regulations within the same 90-day time limitation under which mandatory regulations must be issued. I have attached to this memorandum an appendix listing the statutory provisions in each category.

3. Publication of Proposed Regulations.

The normal agency practice in publishing proposed regulations is to publish the actual terms of the proposal. A rarely utilized provision of the Administrative Procedure Act permits an agency, however, to give notice of proposed rule-making by publishing either the terms of the proposed rule or a "description of the subjects and issues involved." 5 U.S.C. 553 (b)(3). Although this latter option [illegible] little used, it should not be viewed as disfavored "corner-cutting" device. This is so for two reasons. First, the Administrative Procedure Act does not condition the utilization of this alternative upon the issuance of a finding of "good cause," which it requires in other circumstances. _/ Second, the legislative history of the Administrative Procedure Act contains no indication that the Congress frowned upon the utilization of this alternative. Indeed, the Congress drew virtually no distinction between the publication of the actual terms of the proposed rule and the mere publication of the description of the subjects and issues involved. See the Administrative Procedure Act Legislative History, S. Doc. No. 248, 79 Cong., 2nd Sess., p. 18 (Senate Judiciary Committee Print, June 1945); p. 200 (S. Rep. No. 572); p. 258 (H. R. Rep. No. 1980); and p. 358 (House Proceedings). None of the comments contained any criticism about the use of the provision under discussion; some comments simply warned that the notice of proposed rulemaking must be sufficient to fairly apprise interested persons of the issues involved so that they may present relevant data or argument. For example, at one point it was stated that "statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section "; (id., p. 258). In other words, the notice should be "complete and specific." (id., p. 3258).

I bring this to your attention to suggest the propriety of diverting from the original plan to have the actual text of the proposed regulations prepared for publication 45 days after the enactment of the act, that is, on December 5, 1972. That plan contemplated a 30-day period for public comment, which would leave the Agency 15 of the 90 days for revision of the text of the proposed rules in light of the comments. The goal of publication of the text of the rules by December 5 is a difficult one, particularly in light of the internal and external review which those rules would have to go through prior to their publication in the *Federal Register*. It seems to me that we should attempt to utilize the document which Chuck Fabrikant is preparing for the distribution at this Thursday's meeting of representatives of the public as the basis for a notice to be published in the *Federal Register* reflecting the "subjects and issues involved" in our proposed rulemaking. Presumably, we could issue this document in short order, permit the planned 30-day comment period (during which we could be working on the text of the proposed rules), and thereby leave ourselves substantially more than the 15 days originally contemplated to review the comments received.

_/ Thus, "good cause" is required before there can be elimination of notice entirely, or before the required 30-day period between publication and effective date can be eliminated. 5 U.S.C. 553 (b)(B): 553 (d)(3).

APPENDIX

Sections Effective Immediately - Regulations Not Strictly Necessary

Section 9 - Inspection of Establishments, etc.
Section 10 - Trade Secrets
*Section 12 - Unlawful Acts
Section 13 - Stop Sale, etc.
Section 14(b) - Criminal penalties (regs. inappropriate)
Section 16 - Judicial Review (regs. inappropriate)
Section 20 - Research and Monitoring
Section 21 - Solicitation of Comments
Section 22 - Delegation
Section 23 - State Cooperation

Section Requiring Regulations to be Effective Within 90 days

Section 6 - Administrative Review
Section 14(a) - Civil Penalties
Section 15 - Indemnities
Section 17(b) - Notice to State Department
Section 17(c) - Importation (Secy. of Treas. to issue regs.)
Section 18 - Exemption of Federal Agencies
Section 19 - Disposal and Transportation

*Portions of Section 12 only. Further analysis of effectiveness of Section 12 provisions will be supplied.

§ § § § § § §

TITLE: Authority to Regulate Advertising of Pesticide Products

DATE: July 1973

QUESTION

To what extent does EPA have legal authority to regulate advertising of pesticide products under the Federal Environmental Pesticide Control Act of 1972?

ANSWER

In comparison to the FTC's statutory mandate to regulate false, misleading or deceptive advertising, EPA's authority to control advertising of pesticide products rests upon a weak (or perhaps non-existent) reed.

It can be defensibly argued that EPA has jurisdiction to regulate advertising of pesticide products on two grounds. One theory is premised on EPA's authority to approve all claims made in conjunction with registration of a pesticide and to move against any claims made as a part of the distribution or sale of a registered pesticide which substantially differ from claims made for the pesticide during the registration process. The second theory is that EPA's power to regulate labels and labeling extends to advertising.

However, should the advertising question be litigated, a court might likely hold that EPA has general jurisdiction over labeling but can only regulate advertising if a pesticide product registered for restricted use is advertised without giving its classification. Accordingly, the FTC would have exclusive jurisdiction over false, misleading or deceptive advertising.

At best, EPA would have concurrent jurisdiction with the FTC to regulate advertising of pesticide products, since Congress evidently did not intend EPA to occupy the pesticide advertising field. Thus, the knotty problem would remain: which agency could best fill the breach and protect the consumer from deceptive advertising?

In short, there is no clear legal answer to the EPA/FTC jurisdictional dispute over regulation of pesticide advertising. The FTC position, however, seems to have more clout.

DISCUSSION

The jurisdiction of the Federal Trade Commission to control false or deceptive advertising is well established. [15 U.S.C. 45(a)(1)]. Nothing in the Federal Environmental Pesticide Control Act of 1972 (hereinafter "the Act") [7 U.S.C. 136a - 136y; P.L. 92-516] seems to curtail the FTC's authority to regulate advertising of pesticide products. Accordingly, this memorandum will proceed on the assumption that, regardless of EPA's jurisdiction over pesticide product advertising, the FTC does have authority to control such advertising.

EPA could rely on at least two theories to establish concurrent jurisdiction with the FTC to regulate advertising of pesticide products. For ease of identification, the theories will be denominated "the claims approach" and "the labeling approach."

a. The Claims Approach

Section 3(c)(1)(C) of the Act requires each application for registration of a pesticide to include "a statement of all claims made for it." Thus, as part of the registration procedure, each application must detail all claims that will be made in connection with a particular pesticide. The applicant bears the burden of proof to substantiate claims made for the pesticide by test data. In fact, a pesticide may not be registered until the Administrator determines that the pesticide's composition is such as to warrant the claims for it. [Section 3(c)(5)(A)]. This statutory scheme is buttressed by section 12(a)(1)(B), which makes the distribution, sale or delivery of any registered pesticide unlawful if any claims made for the pesticide as a part of its distribution or sale substantially differ from any claims made for it in the registration statement.

Thus, EPA can invoke stringent sanctions against any person who sells, distributes or delivers a registered pesticide if claims made in the distribution or sale of that pesticide substantially differ from those included in the registration statement. This provision may apply to "claims" made in advertising. Congress, however, used the words "distribution or sale" instead of the word "advertising" in section 12(a)(1)(B). Section 12(a)(2)(E) provides that it is unlawful for any person who is a registrant, wholesaler, dealer, retailer or other distributor to advertise a pesticide product registered for restricted use without giving its classification. The negative implication of the use of "advertise" in one section and not in the other perhaps indicates that the words of art "distribution or sale" should be read more narrowly than advertising in general. "Distribution or sale" may only connote claims made in graphic or written material accompanying the pesticide. [Cf. Definition of "labeling," section 2(p)(2)].

If section 12(a)(1)(B) does apply to "claims" made in advertising, a salient question is whether that section also provides EPA with a handle to regulate all deceptive and misleading advertising of pesticide products. The "claims" requirement would appear to limit EPA from exercising jurisdiction over advertising which, although forged from claims identical to the ones submitted with the registration application, is still misleading or deceptive. The totality of an advertisement may, after all, because of its trapping convey a message beyond the literal language contained in it. The Lysol case, which will be discussed in more depth later in this memorandum, presents this issue in a concrete manner.

Arguments spawned by the meaning of claims substantially different from ones originally proferred in registration applications could widen this potential gap in EPA jurisdiction over deceptive or misleading advertising into a veritable canyon. [Section 12(a)(1)(B)]. Parsing the language of the original claim might not make the claim substantially different, but nuances could produce a deceptive advertisement. EPA would be powerless to attack misleading advertising unless "claim" means "advertising" under the Act, and that does not seem to be the case. As noted previously, Congress specifically used the word "advertise" in one provision of the Act [section 12(a)(2)(E)], and could have easily substituted "advertisement" for "claim" in other places.

In sum, at first blush the "claims approach" appears to grant EPA jurisdiction to regulate advertising of pesticide products, or at least "claims" made in such advertising. However, there may be some question whether section 12(a)(1)(B) applies to advertising. Even if the provision does encompass advertising, EPA could not control deceptive advertising formed from claims identical to or not substantially different from ones submitted in the registration application. Thus, the claims approach does not provide a sufficient statutory foundation for EPA to regulate advertising in general, but does allow the agency to police contradictory claims made for pesticide products.

b. The Labeling Approach

Henry Korp in his memorandum of March 5, 1973, posed the question: "To what extent does the labeling authority under FIFRA extend to regulation of advertising claims?"

Section 2(p) of the Act defines label and labeling as follows:

(1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Department of Agriculture and Interior, the Department of Health, Education, and Welfare, State experiment stations, State agricultural colleges; and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

The key question again becomes whether the term "label" or "labeling" encompasses advertising in general. The limitation of "written, printed, or graphic matter" would not appear to include radio and television commercials, except in highly unusual cases. If this definitional roadblock could be overcome, however, EPA would be home free by focusing on the term of art "misbranded."

A pesticide is misbranded "if its labeling bears any statement, design or graphic representation relative thereto or to its ingredients which is false or misleading in any particular." [Section 2(q)(1)(A)]. Pursuant to section 12(a)(1)(E) it is unlawful for any person to distribute, ship, or sell any pesticide which is misbranded. Accordingly, EPA could forcefully assert jurisdiction over labeling--advertising that is false or misleading in any way. The question of whether labeling can be interpreted to mean advertising, then, is well worth pursuing in depth. */

---

*/ For example, the FDA's experience in this area should be scrutinized.

c. Comparison of the Claims Approach and the Labeling Approach

The claims approach vests EPA with jurisdiction to regulate advertising "claims" which substantially differ from those proferred in the registration application. There may be some doubt, however, whether claims made as part of the distribution or sale of a pesticide are equivalent to claims made in advertising. The claims approach also appears to contain inherent jurisdictional gaps, both as to claims not substantially different from ones submitted in the registration application and also for deceptive or misleading advertising which nevertheless parodies the approved label.

The labeling approach can only be effective if threshold definitional hurdles are overcome, i. e. that labeling can be stretched to mean advertising. However, once this barrier is passed, EPA would obtain general jurisdiction over any false or misleading advertising by focusing on the definition of misbranded.

Neither approach is entirely satisfactory standing alone; the best theory would be to weave a statutory web by plucking the best from both theories. Perhaps in this manner EPA could assume full concurrent jurisdiction with the FTC to control advertising of pesticide products. The knotty practical problem would still remain, however, of establishing each agency's fiefdom.

The Lysol Case

This memorandum would be incomplete if the pesticide advertising cases pending before the FTC were not mentioned. The Lysol dispute, which has advanced to the hearing stage [FTC Docket No. 8899], presents some particularly interesting questions.

The kernel of the FTC Lysol complaint alleges that television advertising has represented that one should use Lysol brand disinfectants to kill influenza virus, and other germs and viruses, on environmental surfaces and in the air, and that such use will be of significant medical benefit in reducing the incidence of colds, influenza, and other upper respiratory diseases within the home. According to the complaint, however, germs and viruses on environmental surfaces do not play a significant role in the transmission of colds, influenza, and other upper respiratory diseases, the use of Lysol brand spray disinfectant does not eliminate significant numbers of airborne germs and viruses, and such use will not be of significant medical benefit for the prevention of the foregoing diseases. The alleged representations, therefore, are claimed to be false, misleading, and deceptive.

Lysol, besides denying the allegations, raised three affirmative defenses, the first of which is particularly in point. In essence, Lysol argued that all labeling of Lysol brand disinfectants had been reviewed and accepted by EPA, and that the advertising challenged in the complaint had at all times conformed with such labels. In a nutshell, Lysol contended that the FTC should not assert jurisdiction over territory already covered by EPA.

The FTC administrative law judge dismissed Lysol's arguments, holding that the complaint concerns advertising, not labeling or labels. The judge further opined that registration of Lysol labels did not constitute EPA approval of the advertising promoting them. [Prehearing conference order, FTC Docket No.

8899, p. 2]. The judge further ruled that even if the advertising conformed to the labels, it still could be deceptive under the FTC allegations. To bolster his decision, the judge cited EPA regulations disclaiming any interest in advertising that will "never be used as labeling," and which state that it is EPA policy for advertising to be handled by the FTC. [40 CFR §162.107(d)].

The Lysol controversy presents such issues as:

(1) Can advertising ever be false or misleading if label claims are literally repreated? (Probably, yes)

(2) If such advertising was held to be false or misleading, would this necessarily affect the legality of a registration? (Probably, no).

Further, the Lysol case demonstrates the necessity of revising EPA's regulation governing advertising of pesticide products.

Pesticide Advertising Regulation

Any discussion of EPA/FTC authority to regulate advertising of pesticide products calls into play EPA's regulation interpreting FIFRA with respect to advertising. [40 CFR §162.107]. This nettlesome regulation generates more questions than answers. The contradictory provisions shroud EPA's position in ambiguity, and although this may have been the regulation's purpose when drafted, prompt revision would seem to be in EPA's best interest.

For example, the administrative law judge in the Lysol controversy cited the regulation to bolster the FTC's contentions. Particularly damaging to EPA's cause is the sweeping statement that "in general, the policy is for advertising, other than labeling, to be handled by the FTC." [40 CFR §162.107(d)]. Even so, EPA can point to statements in the regulation that arguably buttress its jurisdiction over all advertising of pesticide products. [See 40 CFR §162.107 (a)].

RECOMMENDATION

Hopefully, the upshot of this memorandum will be a refined consideration of remaining legal questions and a thorough policy consideration of the thorny practical ramifications of the various alternatives for regulating pesticide product advertising with or without FTC participation. The cornerstone of any final decision should be a wholesale revision of 40 CFR §162.107 to reflect actual EPA policy. A coherent regulation would well serve all parties, including the pesticide consumer.

§ § § § § § §

TITLE: Experimental Use Permits

DATE: February 5, 1973

You have requested per your memorandum of January 30, 1973, a legal opinion on the following questions:

QUESTIONS

(1) Whether federal and state government agencies are exempt from Section 5 of the FIFRA, as amended by the FEPCA, pertaining to experimental use permits.

(2) Whether, regulations promulgated under Section 5 can exempt federal and state agencies.

ANSWER

The Office of Pesticides has taken the position (as published in 38 F.R. No. 5, January 9, 1973, "Implementation Plan, Pesticide Control Act") that until the "emergency conditions" exemption for government agencies, contained in section 18 of the FEPCA, is implemented by the promulgation of procedural regulations, the 1947 FIFRA remains in effect as to public officials. Pursuant to this position, the previous exemption from the experimental use permit requirements for certain government agencies (Section 7(a)(4) of the old FIFRA) remains in effect, pending the promulgation of procedures for implementing Section 18 of the FEPCA.

As to your second inquiry, it is our opinion that regulation under Section 5 of the FEPCA providing a blanket exemption for government agencies would be impermissible. Section 5 provides for no such exemption. Nor are government agencies as such included within the exemptions to penalties under Section 12, Unlawful Acts.

Because Section 18 is the only provision of the Act which expressly provides for exemption for government agencies, a strong presumption exists that Congress intended to exempt government agencies from the Act's substantive requirements only in accordance with the procedures of that section. Any government agency exemption from Section 5 or other provisions of the Act must be provided under the authority and subject to the specific conditions of Section 18 and regulations promulgated thereunder.

In addition, since government agencies will be required to register pesticides under Section 3 of the FEPCA (except insofar as exemption from registration by "emergency conditions" under Section 18), it would seem that the inclusion of such agencies within the experimental use permit requirements would be necessary, as well as prudent.

§ § § § § § §

TITLE: Must a Request for an Advisory Commitee be Automatically Granted in Pending Cancellation Proceedings?

DATE: December 27, 1972

We have been asked to prepare a memorandum on the Agency's right, in a cancellation proceeding, to treat a registrant's request for an advisory committee, made before the effective date of the Federal Environmental Pesticide Control Act of 1972 (FEPCA), as a request for a public hearing under the new law, where reference to an advisory committee will be in the discretion of the hearing examiner. This memorandum, reflecting our view that the Agency need not grant such requests for direct advisory committee review, is submitted in response to that request.

DISCUSSION

1. The Legal Background

The law is clear that unless the legislature has expressed a contrary intention, courts will regard a change in the procedural or remedial aspects of a statute as immediately applicable to existing causes of action, and not merely to those which may accrue after the statutory amendment.

The case most closely in point is probably Turner v. U.S., 410 F. 2d 837 (5th Cir., 1969), where the Court held that changes in the administrative procedure of the Selective Service System which were enacted while appellant's case was pending were immediately applicable.

Turner's local board denied his claim for Conscientious Objector status. Turner appealed this action to his State board on May 26, 1967. Under the Selective Service Act of 1948, then in effect, upon the filing of an appeal in any Conscientious Objector case, the Department of Justice was obligated to conduct an independent inquiry and a hearing on the claim and to make a report to the State appeal board. Its recommendations were to assist that board in reaching its final determination.

On June 30, 1967, after Turner had perfected his appeal, Congress amended the Military Selective Service Act, deleting the procedure for advisory review by the Department of Justice. Turner was denied his hearing before the Department of Justice; that Department refused to inquire further into his case and to make recommendations to the State appeal board.

The court rejected Turner's contention that he had a vested right to the particular form of administrative procedure in effect on the date of his appeal. The administrative provision of the amended statute was "merely a specialized procedure for assisting an appeal board to reach a more informed judgment. . . and did not create substantive rights for claimants." (id., at p. 841).

The court stated that the general legal principle of applying changes in procedural rights to all pending cases defers only to a contrary Congressional intention, expressed in the statute or, if the Act is unclear, in the legislative history. The court held that a purpose of amending the Selective Service Act had been to avoid substantial and unnecessary delays caused by the numbers of such Justice Department hearings without corresponding significant benefits. The statute and the legislative history reflected no reason why this Congressional purpose should not be directly and immediately implemented by applying the new procedure to pending cases.

U.S. v. Haughton, 413 F. 2d 736 (9th Cir. 1969), was a very similar case. Although Haughton had appealed the denial of his Conscientious Objector claim over one month before the adoption of the 1967 Selective Service Act, the Court stated that the procedural changes in the law were immediately applicable to pending cases and that he was not entitled to Justice Department review.

In that case the court deferred to the interpretation given the statute by the administrative agency. When Congress enacted the 1967 Act, removing the advisory role of the Department of Justice, that Department had returned all unprocessed files of Conscientious Objector claimants, even though they had been received prior to the adoption of the new statute. In sustaining this action, the court cited with approval Udall v. Tallman, 380 U.S. 1(1965) and quoted its statement that "When faced with a problem of statutory construction. . .", a court should show "great deference to the interpretation given the statute by the officers or agency charged with its administration."

The holdings in these cases rest on precedents established by the Supreme Court.

In Thorpe v. Housing Authority of the City of Durham, 89 S. Ct. 518 (1969), the Housing Authority, acting under existing regulations of the U.S. Department of Housing and Urban Development, proceeded to evict Thorpe. After the initiation of eviction proceedings but before Thorpe had been legally removed, HUD changed its procedural rules to require that a hearing be granted tenants subjected to eviction. The Court ruled that the regulation was applicable to all pending cases.

In Hallowell v. Commons, 239 U.S. 502 (1916) a suit to determine Indian heirship was pending in federal court when Congress enacted a law vesting in the Secretary of the Interior jurisdiction over such suits. Justice Holmes held that because the statute made no exception for pending litigation, this suit must be sent to the Department of Interior for resolution. To do so breached no substantive right, but simply changed the tribunal which was to hear the case and the procedures that would apply.

In these cases, immediately applying procedural requirements made far more of a difference to the parties than it would under FEPCA. The two selective service cases upheld the elimination of a previously mandatory inquiry; Hallowell changed the nature of both the forum and the procedures from judicial to administrative and specifically eliminated judicial review; and Durham added a hearing that had not previously been required. By contrast, FEPCA neither eliminates any proceeding outright nor changes the nature of any forum. It simply changes what was always an advisory proceeding from mandatory to discretionary.

2. FEPCA Itself

Nothing in the purpose, legislative history, language or structure of FEPCA suggests an intent to vary the normal rules of statutory interpretation and make the procedural requirements of the old FIFRA applicable to pending cancellations. In fact, all indications are to the contrary.

a Purpose and Legislative History. Under FIFRA prior to the 1972 amendments, a person adversely affected by the Administrator's action in cancelling a pesticide registration could require that a scientific advisory committee be impanelled to review the issues raised by an order.

The committee had to have completed its deliberations and delivered its report and the Administrator had to have acted on it before the proceedings could move on to their next stage, which was a formal hearing.

Under Section 6 of the new FIFRA the mere motion of a registrant no longer automatically requires the impanelling of a scientific advisory committee. Rather, a registrant adversely affected by the Administrator's Order is entitled as of right to a public hearing. The issues will be formulated before a hearing examiner and scientific evidence will be offered. Before the close of the hearing record any party may request the Hearing Examiner to refer the relevant questions of scientific fact to a Committee of the National Academy of Science for its report and recommendation. When in the Hearing Examiner's judgment this action is necessary or desirable, he may grant such a request.

The purpose of this change is to avoid the unwarranted, lengthy delays occasioned by the old procedure. Advisory committees were too often routinely requested when in fact such prolonged review of the scientific issues was unnecessary to the proper resolution of a case, duplicative of evidence independently adduced at public hearing and was interposed merely for purposes of delay.

Under FEPCA these costs in terms of delay will be undertaken when they are warranted by the scientific benefits to be gained from appointing such a panel of review and recommendation. The public hearing process will help to clarify which scientific issues, if any, are in controversy and will help determine which issues can be resolved by impanelling an advisory committee.

This purpose was underlined by the House Agriculture Committee in its report. It said that one main purpose of the changes was "to avoid frivolous and nongermane issues from [sic] burdening the hearing and review process...." H. R. Rep. No. 92-511 (92d Cong. 1st. Sess.) (Sept. 25, 1971) p. 14. Yet the language being discussed there was not as strong as it was in the final statute. The House Bill required all relevant questions of scientific fact to be referred to an NAS Committee "Upon the request of any party or when in the hearing officer's judgment it is necessary or desirable" (emphasis supplied). The Conference Committee changed the underlined "or" to "and".

Even stronger objections to the way the advisory committee provision functioned under the old FIFRA were made by witnesses before the various committees that considered FEPCA. See, e.g., Report of Hearings before the Senate Subcommittee on Agricultural Research and General Legislation, Federal Environmental Pesticide Control Act, (March 23-26, 1971).

In short, Congress in changing the advisory committee provision meant only to eliminate unnecessary delay while preserving all the substantive advantages of expert review of it. This purpose can only be fully served by putting the new provisions into effect as quickly as possible.

b. Language and Structure. Section 4(a) of FEPCA provides that all the provisions of the new law shall become effective upon enactment except as otherwise provided. Though the remainder of Section 4 indicates that Congress considered the question of the effective dates of various sections in detail, there is no mention of the advisory committee provision. It therefore falls under the first paragraph and became effective immediately.

§ § § § § § §

OPINIONS BASED ON FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

TITLE: Advisory Committee's Release of Submission Transcripts

DATE: January 3, 1972

Dr. Richard L. Doutt
Chairman
Advisory Committee on Aldrin and Dieldrin
Environmental Protection Agency
12th & Independence Avenue, S. W. (Rm. 3119)
Washington, D. C.

Dear Dr. Doutt:

I have been asked for an opinion as to whether the Advisory Committee on Aldrin and Dieldrin is required to provide the public, on request, with copies of written submissions and of transcripts of oral presentations made to the Committee by interested parties.

As I understand the facts, the Environmental Defense Fund has made such a request. Furthermore, at least one registrant has stated through its counsel that it does not object to the public availability of the material in question, as long as the submissions of all other parties are equally available.

Section 4.c of the Federal Insecticide, Fungicide, and Rodenticide Act provides in pertinent part:

> "All data submitted to an advisory committee in support of a petition under this section shall be considered confidential by such advisory committee. . . ."

Accordingly, I do not believe you are authorized to release submissions or transcripts to the Environmental Defense Fund or to any other person that may request them, at least not until the party submitting the data involved has expressly consented to its release. I note that the only registrant which has expressed itself in connection with the Environmental Defense Fund's request has attached a condition to its consent. Your Committee is not in a position to honor that condition, since you cannot agree to make available to that registrant, or to other persons, data submitted to your committee by other parties until they have consented to its release themselves.

§ § § § § § §

TITLE: Section 14(a) of FIFRA and Abbreviated Hearing

DATE: February 12, 1973

Your office has requested an answer to the following questions:

(1) Whether, under Section 14(a) of FIFRA, as amended, and abbreviated hearing can be used to impose a civil penalty for violation of the Act;

(2) What procedural devices can be instituted, if any, which would reduce the need for hearings in civil penalty cases.

APA Hearing Necessary

Section 14(a)(3) of the FIFRA, as amended, requires that, a civil penalty be imposed only after notice and opportunity for a hearing. It is our opinion that this section of the Act requires a hearing in accordance with the Administrative Procedure Act (5 U.S.C. §556), unless the respondent waives the right and agrees to some sort of an abbreviated hearing. The trial type proceedings of the APA apply to any determination required by statute to be made on the record after notice and opportunity for hearing (5 U.S.C. §554). While Section 14(a) of the FIFRA does not expressly require that the civil penalty hearing be "on the record," the legislative history of the APA (See H.R. Rep. p. 51, ftn. 9; Sen. Doc. #248, 79th Cong., 2d Sess. (1946)) and the Attorney General's Memorandum on the Administrative Procedure Act hold that, if a statute requires that a determination of adjudicatory fact be made after a hearing, a presumption arises that Congress intended the determination to be based on evidence adduced at the hearing, i.e. "on the record." This presumption would trigger the requirements of APA, unless the statute or the legislative history of FIFRA expressed a contrary Congressional intention. (Also see Tagg Bros. and Moorhead v. U.S., 280 U.S. 420; and Won Yan Sung v. McGrath, 339 U.S. 43.)

The legislative history of the FIFRA is not helpful in defeating this presumption. Section 16(b) of the Act actually reinforces the conclusion that an APA type hearing is necessary. Section 16(b) requires that the Courts of Appeal have exclusive jurisdiction of an appeal of an Agency determination made after a hearing. One method of ascertaining Congressional intention to require an APA trial-type hearing is to determine what type of judicial review the statute provides. If judicial review of agency determinations of adjudicatory facts is in the district courts - trial de novo is possible, an agency record is unnecessary for judicial review and arguably Congress intended that an APA proceeding not be held at the agency level. Similarly, if judicial review of adjudicatory determinations is in the courts of appeals, a trial de novo is impossible, and agency record is necessary for effective judicial review, and the strong implications is that Congress intended an APA type hearing at the agency level.

Settlement.

A formal settlement regulation might reduce the number of hearings.

Once a citation had been issued for violation of the Act, the Office of Enforcement and the Respondent could negotiate a settlement agreement, including stipulations of fact as to the circumstances of the violation, a statement of agreement as to an appropriate civil penalty and other remedial action under the Act, and a statement of reasons as to why the proposed settlement serves the interests protected by the FIFRA. In addition, if no agreement can be reached on the size of penalty the statement of reasons would contain argument by both parties on the question of penalty and on the issues which the Administrator is required to consider in determining a penalty (Sec. 14(a)(3)). Each party would have to agree to be bound by the Administrator's determination on the penalty issue.

This settlement agreement would be submitted to the Administrator or the Judicial Officer for approval or disapproval. A case, once a citation has been issued, can not be withdrawn, dropped or settled without a final order of the Administrator. If the settlement were approved, a final order would be entered and the case terminated without the need for a hearing. If the settlement were not approved, the parties could either rework the settlement agreement to comply with the Administrator's (Judicial Officer's) objections or the respondent could receive a public hearing under the Act.

Following is a suggestion as to how regulations, embodying a settlement procedure, might read:

> "Settlement Procedure.
>
> No case pending under Sec. 14 of the FIFRA, as amended, shall be disposed of or modified without an order of the Administrator (Judicial Officer). All parties to any case in which a settlement or compromise is proposed shall file with the Administrator (Judicial Officer) a written statement, signed by the parties, or their authorized representative, containing a stipulation of facts and outlining the nature of, the reasons for and the purposes to be accomplished by the settlement. Said statement shall contain a statement of reasons as to why the proposed penalty or other remedy serves the public interest protected by the FIFRA, taking into account the appropriateness of the proposed penalty to the size of the business concerned, the economic reasonableness of the proposed penalty, and the gravity of the violation.
>
> The Administrator shall have the right to require that any or all of the parties appear before the Administrator to answer inquiries relating to the proposed disposition or, if the parties stipulate to the facts surrounding the violation but differ as to the amount of the proposed penalty, for the purpose of oral argument on the issue of penalty."

TITLE: Must EPA Require a Foreign Registrant to Designate a Domestic Agency

DATE: June 23, 1972

Section 25(a) of the FIFRA as amended by the FEPCA authorizes the promulgation of regulations to carry out the provisions of the Act. The courts have construed such a general delegation of power in other statutes as enabling an agency to adopt all regulations (procedural and substantive) which are compatible with the statutory purpose and necessary to the effective enforcement of the Congressional scheme. See American Trucking Ass'ns, Inc. v. U. S., 344 U. S. 298; Ciba-Geigy Corporation v. Richardson, 446 F 2d. 465 (C.A. 2, 1971); National Broadcasting Co. v. U. S., 319 U. S. 190. In American Trucking the court held that the Interstate Commerce Commission could regulate the trip leasing of vehicles despite the absence of specific statutory authority to control such operations. The requisite authority was found in section 204(a)(6) of the Interstate Commerce Act, (49 U.S.C. sec. 301) which grants the ICC power to adopt regulations for the administration of the statute. The Court stated that the regulation in issue was necessary to implement the Congressional regulatory scheme. Otherwise the unquestioned authority of the ICC to regulate areas specifically defined in the statute would be defeated.

Section 25(a) of FIFRA is a general delegation of regulatory authority very similar to that in the Interstate Commerce Act. By requiring that a foreign firm designate a domestic representative for purposes of registration, the suggested regulation would assure the availability of a party whom may be enforced the environmental safeguards which are the object of the Act. Such a regulation would also facilitate administration of the Act by assuring the proximity of a person who can speak on behalf of a foreign applicant in all registration matters. Thus, the proposed regulation of foreign registrants clearly meets the standards of American Trucking (supra). It tends to implement the regulatory scheme of the Act; it is not inconsistent with the statutory purpose; and it is necessary to the effective enforcement of the statute.

In addition, the suggested regulation can be supported on the ground that it is necessary if the Agency is to obtain from foreign registrants the bookkeeping information required to enforce the Act. Section 8(b) permits Agency inspection of records relating to the type and quantity of pesticides produced and to the delivery, movement or holding of these pesticides. Without the proposed regulation over foreign producers the inspection of these records would not be practical (although it may be legal, on foreign soil). Effective enforcement of the Act against foreign producers whose pesticides are registered and distributed in the United States requires that they maintain domestic agents to act as repositories of the necessary records, and a regulation requiring such can be promulgated under Section 25(a).

Finally, although the legal basis of the suggested regulation is not necessarily strengthened by the fact that other agencies have taken a similar course of action, similar regulations can serve as a model, if not a precedent, for the Agency's rule-making as to foreign registrants.

Section 25(a) of the FIFRA is a general delegation of authority very similar to section 371(a) of the Food, Drug and Cosmetic Act and to section 78w(a) of the Securities Exchange Act of 1934.

The FID requires that a person registering a new drug must reside or have a place of business in this country or be represented by an agent who resides or maintains a place of business in the country (21 CFR 130.4(a)). Also the Food, Drug and Cosmetic Act allows a foreign exporter to obtain an exemption from the Act for a drug shipment to this country which is to be used for "investigational purposes" (21 U.S.C. 301; 355(i)). In order to qualify for the exemption, a foreign exporter must comply with regulations promulgated by the FDA, one of which requires the application to be signed by the drug importer acting as agent of the foreign exporter. By regulation, this agent must assure compliance with the substantive requirements of an applicant for the statutory exemption (21 CFR 130.3(b)(2)). The FDA adopted these regulations under section 371(a) of that Act, which authorizes the Secretary to adopt regulations for the "efficient" enforcement of the statute.

The SEC has promulgated a regulation applicable to non-resident investment companies and advisers who register in this country under the Investment Advisers Act of 1940. In order to register, these investment advisers must furnish the SEC with a written, irrevocable consent and power of attorney, designating the SEC as agent of the registrant upon whom process, pleadings and other papers may be served in any proceeding arising under the federal securities laws (17 CFR 230.173). This regulation is based on 15 U.S.C. 78w(2) which grants the SEC power to make all rules necessary to execute functions otherwise vested in it by law.

§ § § § § § §

TITLE: DDT Administrative Litigation

DATE: March 15, 1971

FACTS

As you know, the Pesticides Regulation Division of this Agency issued notices of cancellation (PR Notice 71-1) for all remaining registrations of economic poisons containing DDT in late January, 1971, under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135-135k) [hereinafter the FIFRA]. In response thereto, 42 registrants have filed objections and requested a public hearing pursuant to section 4.c of the FIFRA (7 U.S.C. 135(c)). Also, the largest manufacturer of DDT in the United States, Montrose Chemical Corporation of California, has filed a petition under section 4.c requesting referral of this matter to an advisory committee.1/

1/ In addition, one fod processor, H. P. Cannon & Sons, Inc. of Bridgeville, Delaware, has filed objections and a request for public hearing as a user of DDT (Cannon is not a registrant under the FIFRA). There are also outstanding from a previous cancellation action by the Department of Agriculture a petition for referral to an advisory committee by Crop King Company in Washington State, and objections and request for a public hearing by Lebanon Chemical Corporation, another large manufacturer of DDT.

QUESTION

May the public hearings be conducted simultaneously with consideration of this matter by the advisory committee?

ANSWER

Yes.

DISCUSSION

Section 4.c of the FIFRA gives a registrant the right to request a public hearing or referral to an advisory committee. No provision is made for the now common situation in which two or more registrants are affected by the same notice of cancellation. The Department of Agriculture practice in this situation was to move that requests for public hearings be held in abeyance pending the report and recommendations of the advisory committee. (This was done in the lindane cancellation.)

While the above procedure appears most reasonable, it does raise problems in regard to the DDT litigation. One of the common allegations of the anti-DDT forces is that the government has dragged its feet for years in bringing the DDT issue to a resolution. Simply constituting an advisory committee to consider DDT can consume much time. 2/ The 2, 4, 5-T Advisory Committee report and recommendations will be submitted a year after the initial petitions were filed. It may be possible to use the DDT Committee being constituted for Crop King Corporation to consider the PR Notice 71-1 issue also. Even after this, section 4.c provides that the Administrator must issue another order within 90 days, petitioners have 60 days to then file objections, and only then can the matter go to public hearing. All the while the outstanding initial requests for public hearings are held in abeyance.

It does not appear from the statute or the legislative history that the Congress specifically considered this matter. However, there is nothing in the statute that would preclude concurrent proceedings where different registrants had asked for different procedures in regard to the same notice of cancellation.

In the event the Agency does conduct the proceedings simultaneously, it is entirely possible that registrants adversely affected by the order issued following public hearing may seek judicial review in an appellate court under section 4.d of the Act prior to completion of the advisory committee proceeding or issuance of the order by the Administrator. In such event, it appears likely that such a court might well issue a stay order pending the completion of the proceedings involving the registrant who requested the advisory committee.

Therefore, we conclude that legally this Agency can immediately move toward public hearings for these 42 registrants, while moving concurrently to constitute an advisory committee for the other registrant.

2/ Constituting a 2, 4, 5-T Advisory Committee took 8 months, and a Mercury Seed Treatment Committee 4 months. These were expeditiously constituted, as compared to other committees because of concurrent court litigation. Simply stated, at the present time the Agency does not have the capacity to consititue advisory committees expeditiously, say within two months of a petition.

PESTICIDE ACCIDENT SURVEILLANCE SYSTEM

TITLE: Implementation of the Pesticide Accident Surveillance System

DATE:

QUESTIONS

You have requested advice on the following issues pertaining to the implementation of the Pesticide Accident Surveillance System ("PASS"):

(1) Is the data collected under PASS subject to public disclosure? Apparently, the Agency's primary concerns, here, are:

(a) that the identity of those who report accidents ("informers") be kept confidential in order not to discourage members of the public from volunteering teering information;

(b) that the identity (and other personal information) of those whom the accident report concerns be kept confidential as a matter of personal privacy;

(c) that the contents of all accident reports be kept confidential, at least pending an Agency investigation, in order to avoid unnecessary public fear and commerical injury caused by unfounded accusations which may occur in some PASS reports.

ANSWERS

(1) Except for the following data, information submitted under PASS is subject to disclosure via the Freedom of Information Act (5 U.S.C. §552).

(a) The Agency can probably preserve the confidentiality of "informers" to the extent such persons have so requested. To this end, I advise the addition to the Pesticide Episode Investigating Form (PEIF) of a clause whereby the informer can, under signature, request that his identity be kept confidential.

(b)(1) The Agency can also preserve the confidentiality of the "victim" (assuming the informant and the victim are different persons) to the extent the PASS report contains his medical data or other personal information the disclosure of which would constitute an unwarranted invasion of privacy. (While it is difficult to foresee what non-medical information, as called for by the PEIFs, might fall within this "invasion of privacy" exception, OGC should be contacted in cases of doubt.)

(b)(2) The Agency can maintain the confidentiality of specific commercial or financial information submitted voluntarily under a request for confidential treatment. The only information called for by the PEIF which appears to fit within this category is the monetary loss which a person may have suffered in a particular accident. This loss could be stated both in terms of dollars and items (such as the number of cattle or the acres of a crop which a particular farmer lost in a specific accident). This commerical information must have been confidential before the Agency receives it. While a request for confidentiality need not be made if the commerical data is such that the person would normally want to keep it secret, I advise that PEIF contain a provision for requesting confidential treatment of such monetary loss data. This exemption would cover confidential commerical or financial data submitted to EPA by state or federal government agencies, as well as by persons (including corporations), as long as the government agencies had in turn received the data in confidence. The exemption will not permit the Agency to withhold aggregate commerical or financial data not related to a specific person, even if the components has been submitted in confidence (e.g., the fact that Farmer Jones reports he lost 75% of his cattle herd in a pesticide poisoning incident, if confidential, is subject to non-disclosure; the fact that in 1973, mercury pesticide poisoning killed 500 cattle, or cost $100,000 in Texas must be revealed, as long as to do so would not disclose the commercial information of any specific person).

(c) EPA can refuse to disclose (except to a party in litigation with the Agency) any specific PASS report which is contained within a file compiled for purposes of law enforcement or which is part of an active litigation file. To the extent that any particular PASS report raises questions of law enforcement and is immediately subject to investigation to determine what, if any, legal steps should be taken, the Agency may be able to withhold such report for a reasonable period after it is filed. If such action serves a legitimate agency need, I advise the promulgation of a regulation permitting the non-disclosure of a PASS report for 90 days after it is filed, in order to allow the Agency to investigate for purposes of law enforcement. At the end of this period, if the PASS report has not become part of an active enforcement action or an action under Section 6 of the FEPCA; or part of such action that is being contemplated and is soon to be initiated; or if such report is not part of a law enforcement action being undertaken or planned by some other division of EPA, or some other federal agency (e.g., Clean Air Act: Federal Water Pollution Control Act; Department of Labor and OSHA; FDA; etc.) which has in the interim requested non-disclosure of the file, the PASS report must be disclosed, barring some other exemption. In addition, those portions of PASS reports which do not relate to the law enforcement purpose but which are contained within the litigation file, are subject to disclosure.

QUESTIONS

(2) If PASS reports are to be made available to the public, can restrictions be placed upon access to the PASS data bank?

(3) What is the legal liability of those who provide PASS information, if such information is disclosed via the Freedom of Information Act?

ANSWERS

(2) The threshold requirement of one seeking public disclosure is the necessity of requesting "identifiable records." To the extent individualized PASS reports are fed into a data bank to produce various categories of composite pesticide information, the aggregate data are subject to disclosure so long

as any member of the public can identify the kinds of data he wants and that data is on record in the data bank or can reasonably be assimilated. No exemption to the Freedom of Information Act allows the withholding of such composite data, although certain exemptions, discussed supra, may allow the withholding of certain identifying details of composite data.

(3) Informants are protected from liability under the defamation laws by a qualified privilege. The information which they submit is privileged absent a showing of actual or implied malice. Good faith reports as to the cause of a pesticide accident would fall within the privilege.

I. Freedom of Information Act, Exemptions from the Requirement of Public Disclosure.

The relevant exemptions to FIA's requirement of public disclosure are as follows:

(a) "commercial and financial information obtained from a person and privileged or confidential ("Exemption 4");

(b) "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" ("Exemption 6");

(c) "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency" ("Exemption 7").

A. Exemption 4 would clearly permit the withholding of particular data on the economic loss which a person or business suffered by virtue if a pesticide accident, so long as such data was of a type which its owner would normally not want to be made public or was confidential prior to the PASS report and its owner requested continued confidentially. This data must have been submitted to government voluntarily by a person outside government who would normally keep it confidential on his own behalf. General Services Administration v. Benson, 415 F. 2d 878 (C.A. 9, 1969); although such PASS data received from other government agencies which in turn received it under an agreement of confidentiality, is subject to non-disclosure. 1/

1/ (Cf. EPA, "Public Information," Part 2, Federal Register, Vol. 37, No. 94, Saturday, May 13, 1972.) Also see Bristol Myers v. FTC, 424 F. 2d 935 (C.A.D.C., 1970) to the effect that the purpose of Exemption 4 is to protect the privacy and competitive position of a citizen who offers information to assist government policy makers.

While there is some support for the view that Exemption 4 is broader than its language, allowing the withholding of confidential information which is not commercial or financial data, I advise that as to PASS information, exemption 4 be utilized only to the extent discussed, supra. 2/

2/ Two views exist as to the breadth of Exemption 4:

(a) The Attorney General's Memorandum on the Freedom of Information Act (p. 32) concludes that, the statutory language notwithstanding, Congress intended Exemption 4 to apply to all information given voluntarily to government and which is otherwise confidential or privileged. This view is accepted, apparently, without explanation in some district court cases.

Barcelonata Shoe Corp. v. Compton, 271 F. Supp. 591 (DPR 1967), held that statements given NLRB investigators were confidential and need not be disclosed. Because the statements involved charges of unfair labor practices which were under investigation by the NLRB, Exemption 7 clearly applied and was relied upon by the court. This fact, in addition to the court's failure to explain its circumvention of the plain wording of the FIA in order to rely on Exemption 4, undermines meaningful reliance on Barcelonata.

Wecksler et al v. Schultz. 324 F. Supp. 1084 (DDC, 1971) held that the Department of Labor's investigatory report of a fire and explosion at a refinery was subject to non-disclosure under Exemption 4. While it is possible that the accident report contained trade secrets or confidential commerical and financial data, it is difficult to understand how the entire report could be withheld under Exemption 4 unless the court were of the view that this exemption covers all kinds of confidential information. In any event, the court's failure to state the basis for its finding undermines the value of relying on this decision to withhold non-commercial data contained within a PASS report. Also see Tobacco Institute v. F.T.C. (unreported, Dist. Co. No. 3035-67); public responses to a questionnaire concerning the effects of smoking on health are within Exemption 4.

(b) Professor Davis, Administrative Law Treatise (1970 Supplement), §3A.19, is of the view that the legislative history of Exemption 4 is not supportive of the Attorney General's position. The Davis view is supported by a string of cases. Grumman Aircraft Engineering Corp. v. Renegotiations Board, 425 F.2d 578 (CADC 1970); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (CADC 1971); Getman v. NLRB, 450 F.2d 670 (CADC 1971); Consumers Union of U.S., Inc. v. Veterans Administration, 301 F.Supp. 796 (SDNY 1969).

A possible explanation of this conflict in the cases is that the broad interpretation of Exemption 4 by some courts has been motivated by the need to protect citizens who provide information, voluntarily assisting government policy makers. Those courts taking the more literal view of Exemption 4 have not been confronted with such a policy consideration. to the extent the courts might find such a policy a compelling reason to preserve the identity of informers, (the policy would not apply to protect the substantive contents of a report) less strain is put on the clear language of the statute by attempting to fit such non-disclosure within Exemption 6. See text, infra.

B. Exemption 6 permits the withholding of those portions of PASS reports which contain personal medical information, the disclosure of which would reveal (or lead to the discovery of) the identity of the person whose medical status is described in the report. For example, the name and address of a person injured in a pesticide accident whose medical status is described in a PASS report is subject to non-disclosure. Other data in the report which, if disclosed, could reasonably lead to the disclosure of the accident victim as linked to his medical status are also subject to withholding.

Although such "injury" information may not clearly constitute a personal medical file, its health-related quality is probably sufficient to permit withholding under Exemption 6. Robles et al. v. EPA (unreported opinion, Civil No. 72-517 HM, DM 1972), involved a suit under the Freedom of Information Act to compel the disclosure of the results of radiation tests run by EPA in various homes in Grand Junction, Colorado. EPA had agreed to reveal the results but refused to reveal the identity of the households involved in the testing. The court ruled that the identity of the individuals' homes, as related to the levels of radiation measured, constituted personal information as to the health of individuals, which information was similar to medical files and subject to non-disclosure under Exemption 6.

This health-related exemption would likely apply to much of the "human" PEIF, but only insofar as specific accident or health data could reasonably lead to the identity of the accident victim. Composite data such as the number, and the nature of injuries sustained in a given episode, are not protected. Similarly, some PASS reports may actually consist of medical files or portions thereof transmitted by a doctor or a hospital with consent of the patient. The contents of such medical files as they would lead to the identity of and be related to the patient are subject to non-disclosure. But the statistical results of many such medical files are subject to disclosure, so long as the identity of individual patients is protected. 3/

C. Exemption 6 may permit withholding the identity of persons filing PASS reports. This exemption requires that withheld information relate to a matter of personal privacy, similar to medical or personal data, and that the disclosure of this information constitute an invasion of privacy which clearly unwarranted, when balanced against the public interest in disclosure. Several cases under FIA lend partial support to the application of this theory to PASS informants.

The decision in Robles et al. v. EPA (supra) to withhold the identity of households in which EPA had measured radiation levels rests in part on the fact that EPA has promised to maintain the confidentiality of the sources as a condition precedent to receiving the information. While the court also found that these identities constituted information "similar to" personal medical data, its conclusion appears to rest simply on the fact that the identity of such persons and

---

3/ Applicable to the entire discussion of FIA exemptions is the determination that an entire document cannot be withheld simply because it contains some confidential information, if the source of the privileged portions can be reasonably protected while revealing non-confidential parts of the document. Grumman Aircraft Engineering Corp. v. Board, op. cit.

their households is a matter of personal privacy. The invasion of this right to be free from unwanted publicity was "clearly unwarranted" in light of the willingness of EPA to disclose the radiation levels, without identifying specific persons or households.

In *Wirtz* v. *White*, 272 F. Supp. 70(D.C. Okl.), the court held that the Secretary of Labor in an action under the Fair Labor Standards Act was not required to reveal the names of defendant's employees who had complained to the Department of Labor. Such information is privileged and confidential. Also see *Schapiro & Co.* v. *SEC*, 339 F. Supp. 467 (D.C.D.C., 1972), where the court in holding that certain information must be disclosed under FIA, ruled that the identity of the informant may be withheld.

Getman v. *NLRB* (op. cit.) held that exemption 6 did not apply to a list of employees eligible to vote in a particular union election. The case is distinguishable from the PASS situation in that the list of eligible employees was required to be submitted to government by the employer (unlike PASS information, which is voluntary) and the disclosure of these names would not subject the employees to an unwarranted invasion of privacy. Disclosure of the employees' names was sought by two professors studying the process of union elections, and such disclosure would, at most, subject the employees to a request for an interview. In the case of PASS informants, the invasion of privacy is much more significant. Such disclosure would subject informants to economic retaliation by employers, to forms of harrassment by members of the community adversely affected by the reporting of the accident, and to unwarranted publicity.

Finally, to the extent that *Getman* recognizes a right to privacy in maintaining the confidentiality of names held by government (although that court ruled that the invasion of such privacy was not "clearly unwarranted") it supports the position of EPA in withholding the identity of PASS informants.

It is probable that EPA may, in most cases, withhold the identity of PASS informants. Such non-disclosure should only be undertaken at the express request of the informant and with the recognition by the informant that under certain circumstances (e.g., a lawsuit related to the accident in which a party obtains a subpoena requiring disclosure) disclosure may be required.[4]

---

[4] But see *Cooney* v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (1968); Executive privilege may be valid basis to withhold identity and statements of non-governmental informants contained in government investigative files from production in a lawsuit if necessary to preserve full and frank disclosure to government investigators and if not unduly prejudicial to needs of private litigants.

Other cases accord a confidential status to informant's identity. *Rovano* v. *U.S.*, 335 U.S. 53; protect the identity of person furnishing information leading to investigation and criminal prosecution; *State* v. *Viola*, 82 NE 2d 306, cert. den. 334 U.S. 816; withholding identity of one transmitting information in the public interest is to protect such persons from unwarranted publicly or personal harm; *People* v. *Roban*, 45 NY S2d 213, letter written by a citizen to a police official charging a crime is confidential communication, privileged from disclosure; also see *U.S.* v. *Krulewitch*, 145 F. 2d 76; communication between informant and prosecuting attorney is confidential.

D. PASS reports which become part of an investigatory file compiled for purposes of law enforcement are disclosable, if at all, only to a party in litigation with the Agency. However, this exemption has been rather narrowly construed to require that the prospects of enforcement be concrete and not a mere possibility at some unspecified future date. Bristol-Myers Co. v. FTC, 424 F. 2d 935 (C.A. D.C., 1970). See Schapiro & Co. v. SEC (supra), to the effect that enforcement action must be contemplated within the "reasonably near future."

But because of the Agency's added authority under FEPCA to control pesticide use and disposal, it would seem that many PASS reports would constitute the initial step of an investigation and enforcement action. In addition, PASS reports which pertain to currently pending litigation of EPA, such as cancellation proceedings, may be subject to withholding from non-party if made a part of the litigation file. To the extent that any accident report raises questions of law enforcement, by EPA or some other federal agency, the courts may look favorably upon the withholding of such report for a reasonable period, in order to further the investigation into whether enforcement action is warranted. If such a policy is desirable, it should be embodied in a regulation.

Finally, because the policy behind Exemption 7 is to permit the government to keep confidential the procedures by which an agency conducted an investigation and by which it obtained information, the termination of an investigation and an enforcement action does not extinguish the exemption. Investigatory procedure and informant identity may remain confidential although in most cases the substance of PASS reports would be subject to disclosure. See Evans v. Department of Transportation, 446 F. 2d 821 (C.A. 5, 1971), where the identity of an informant who complained about a pilot's competency was preserved 10 years after investigation cleared the pilot of all charges. See Frankel v. SEC, 460 F. 2d 813 (C.A. 2, 1972), to effect that information contained in an investigatory file which is no longer active is not subject to disclosure if to do so would reveal identity of SEC informants.

II. Liability of Persons Who Report or Disclose PASS Data.

EPA employees who reveal PASS information pursuant to FIA enjoy an absolute privilege for defamatory publication. Garrison v. State of Louisiana, 379 U.S. 64.

Citizens filing PASS reports with EPA are clearly protected by a qualified privilege from liability for defamatory statements. 5/ The qualified privilege arises by virtue of the duty or interest (social, moral, or legal) of the informant to communicate the circumstances of a pesticide accident to EPA,

---

5/ Such statements in certain jurisdictions may be accorded quasi-judicial status and accorded absolute privilege. See Boston Mutual Life Co. v. Varone, 303 F. 2d 155 (C.A. 1, 1962). Statement of employer to state insurance commissioner on qualifications of former employee is qualifiedly privileged.

which in turn possesses a corresponding interest in receiving such information. Because the reporting of such an accident to EPA is a method of publication reasonably related to the protection of such interests and because in such cases the public interest in hearing what is reasonably believed to be true outweighs the occasional damage to individuals caused by such publication, the informant is protected from liability, assuming the report is defamatory, absent a showing that is was motivated by ill-will or that it constitutes a conscious falsehood, a statement which the informant did not believe to be true or had no reason to believe was true. Mere negligence does not destroy the privilege.

CONSTRUCTION GRANTS

FEDERAL WATER POLLUTION CONTROL ACT FUNDS

TITLE: Disaster Relief

DATE: December 7, 1971

FACTS

An opinion has been requested concerning the eligibility of sewage treatment plants for FWPCA grants where such plants have been damaged by hurricanes Edith and Fern. The same issue has been presented in other Regions by similar disasters, such as floods, tornadoes, and earthquakes.

QUESTION

Are sewage treatment plants which have been damaged by natural disasters eligible for FWPCA grants?

ANSWER

Yes, to the extent that the grantee is financially responsible for the repair of the damage caused by the disaster. In addition to FWPCA grants, assistance may be available pursuant to the Disaster Relief Act of 1970.

DISCUSSION

Generally, reconstruction or repair of existing sewage treatment plants may be funded under the FWPCA, whether the reconstruction or repair will result in restoration of the plant to its predisaster condition or in the construction of a substantially improved plant. State priority certification must be obtained and applicable statutory requirements must be met, as in the case of other EPA projects. A provision of the Disaster Relief Act of 1970, 42 U.S.C. Section 4483(1), provides that applications for assistance from proclaimed disaster areas may be given priority in processing over all other applications.

Damage to treatment works under construction requires different analysis than that which applies to completed projects. Generally, public construction contracts place the risk of loss attributable to Acts of God (such as hurricanes, tornadoes, floods) upon contractors. The federal rule, confirmed in Arundel Corp. v. United States, 103 Ct. Cl. 688, cert. denied 326 U.S. 752 (1945), is generally identical to the result under state and local public contracts. Contractors generally obtain insurance to cover this contingency, or are self-insured. Accordingly, in the case of damage to sewage treatment plants under construction, inquiry must first be made to determine whether the risk of loss is upon the contractor. If it is, either the contractor or his surety is required to complete the facility. If the construction contract does not place the risk of loss upon the contractor, or if there has been partial acceptance of the facility, then the municipality is eligible for FWPCA funds, to the extent of the loss suffered.

In either event, eligibility for FWPCA funds does not depend upon whether the facility will be restored to its pre-disaster condition or whether an improved facility will replace the damaged plant. Also, in both circumstances, inquiry should be made to determine the extent to which the loss may be covered by an insurance policy or a self-insurance program in order to determine the grantee's eligibility.

A community may also be eligible for Federal assistance under the Disaster Relief Act of 1970 (Public Law 91-606), 42 U.S.C. Sections 4401 et seq., and Executive Order No. 11575 (36 F.R. 37), both of which became effective on December 31, 1970. This Act is applicable to any "major disaster" which the President determines warrants Federal assistance. A "major disaster" is defined (42 U.S.C. Section 4402) to include hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire, or other catastrophe.

This legislation authorizes Federal assistance for the restoration of state and local public facilities; see 42 U.S.C. Section 4482 and 32 C.F.R. Parts 1710 and 1711. Federal assistance is authorized for up to 100% of the net cost of repairing, restoring, reconstructing or replacing any public facility to its predisaster state, in the case of completed facilities; Federal assistance not exceeding 50% is authorized for the restoration of facilities under construction to their predisaster condition and an additional 50% contribution is authorized for the increased cost of additional construction attributable to changed conditions resulting from the disaster.

There is no statutory bar to the application by a disaster-afflicted community for Federal assistance under either the FWPCA or under the Disaster Relief Act, or under both statutes. Initially, the community may decide which statutory remedy to pursue; it may also choose to pursue both remedies. The same administrative discretion to award FWPCA grants applies to disaster projects as to other FWPCA grant applications. The determination to apply for or to award an FWPCA grant will depend upon a number of factors such as (1) the availability of appropriations under either statute, (2) the availability of a priority certification for FWPCA funding, (3) the availability of matching funds required for FWPCA grants, and (4) the difference in cost between the reconstruction of an improved new facility and the restoration of the damaged facility. For instance, where an outmoded facility is destroyed, it may be to the community's advantage to rely chiefly upon FWPCA funding for the construction of a substantially improved new facility, since disaster assistance is generally limited to 100% of the cost of restoring a facility to its predisaster condition.

Under certain circumstances, it appears that FWPCA expenditures for emergency relief may be reimbursed from any appropriations for disaster relief; see 42 U.S.C. Section 4413(c) and 32 C.F.R. Section 1710.7. In no event may a community obtain total Federal assistance in excess of 100% of the net actual cost of reconstruction or repair of the damaged public works; see 42 U.S.C. Section 4418.

Please be assured that the assistance of this office will be made available for the resolution of the questions which may be presented in the administration of the FWPCA in conjunction with the Disaster Relief Act.

§ § § § § § §

TITLE: Appropriations in Title II Construction Grant Program

DATE: July 11, 1973

Your June 21, 1973, memorandum requests an opinion on the following two questions regarding funding for construction grants under Title II of the Federal Water Pollution Control Act Amendments of 1972 (P. L. 92-500):

QUESTIONS

1. Can EPA award construction grants knowing that the subsequent outlays cannot be covered from available appropriations or appropriations that have been requested of the Congress?

2. Can the Government actually make payments for outlays associated with previous obligations if it does not have an appropriation?

ANSWERS

1. Yes, EPA can award grants up to the amount of allotments available to each state, but it has a duty to request additional appropriations sufficient to liquidate the contractual obligations incurred under the grants.

2. No.

DISCUSSION

Article 1, Section 9, Clause 7 of the United States Constitution requires that

> ". . . no money shall be drawn from the Treasury, but in consequence of appropriations made by law . . . ."

This provision has been interpreted to mean, quite simply, that no money may be paid out of the Treasury unless it has been appropriated by an Act of Congress, Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937). While this provision operates as a restriction upon unauthorized action by officers of the Executive Branch, it does not operate to prevent Congress from authorizing the Government to contract to pay money; rather when such contracts are created, the parties who acquire rights to payment thereunder must wait until an appropriation is made before payment may be made, Mitchell v. United States, 18 Ct. Cl. 286 (1883). The foregoing Constitutional requirements and judicial interpretations have been particularized in statutory law, see 31 U.S.C. 627, 665(a). Accordingly, EPA grants awarded under Title II contain a provision explicitly stating that payment under the grant is subject to availability of funds, i.e., appropriations.

The provisions and legislative history of the construction grant funding mechanism in Public Law 92-500 reflect that these provisions were patterned after the funding mechanism for the Federal Interstate Highway construction program. A description of the highway program funding is contained in the recent decision in State Highway Comm. of Missouri v. Volpe (8th Cir., April 2, 1973):

> Based upon specific formulas set forth within the Act, the Secretary is required to apportion among the several states certain sums authorized to be appropriated for expenditure. 23 U.S.C. §104(b). After the apportionment, the states, through their respective highway departments, are to submit programs of proposed projects based upon the apportioned funds. * * * Section 106(a) then provides that "as soon as practicable after program approval," specific "surveys, plans, specifications, and estimates for each proposed project" will be submitted to the Secretary for his approval. * * * It is at this stage that the contract controls are imposed, for once a project is approved by the Secretary it "shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. §106(a). On the basis of this approval, states are permitted to obligate the apportioned funds through the letting of construction contracts, etc. * * * The final stage of the Act is the appropriation by Congress of money from the Highway Trust Fund to pay the state the proportional federal share of construction costs incurred in the partial or total completion of the highway projects."

This contract authorization funding mechanism has been utilized and approved for a number of diverse purposes, e.g., the construction of the memorial amphitheater at Arlington National Cemetery; see 30 OPs. Atty. Gen. 147 (1913). The issue whether to utilize contract authorization funding for construction grants was fully considered during consideration of P.L. 92-500, most particularly on the Senate floor in conjunction with the Boggs amendment (No. 562) to S. 2770 which would have deleted the contract authorization feature of the legislation, but which was defeated.

Section 207 of the FWPCA (33 U.S.C. 1287) now states that there is ". . . authorized to be appropriated. . . ." certain sums for treatment works construction. Under Section 205 of the Act (33 U.S.C. 1285) the Administrator is required to allot to the states amounts not to exceed the sums authorized. Pursuant to Section 203 (33 U.S.C. 1283), the Administrator's approval of an applicant's plans, specifications and estimates ". . . shall be deemed a contractual obligation of the United States . . ." for payment of the Federal share of project costs. The FWPCA Amendments thus contemplate the creation by EPA, within the limits authorized by Congress, of obligations on the federal treasury, subject to the Constitutional requirement for appropriations. This constitutes a change in the normal authorization-appropriation-obligation process which was fully contemplated by Congress:

> "The Committee believes that contract authority is essential if the Federal Government is to carry out its responsibilities in meeting the needs of the Nation for waste treatment works in a timely manner. This authority will permit the States and municipalities to plan their construction programs with assurance that once their plans, specifications and estimates are approved, construction can proceed in an orderly fashion.

> "An appropriation of funds will be required annually to the Administrator to make progress payments to the recipients of grants for the Federal share of the costs of construction as they are earned by contractors on projects under construction." (H. Rep. 92-911, 92nd Cong., 2d Sess., emphasis added.)

It is clear that appropriations are required before Federal funds may actually be paid from the Treasury, although the agency, within limits authorized by law, may obligate the Treasury for payment of funds in advance of actual appropriations. Should initial outlay estimates prove incorrect during the course of each fiscal year, it is incumbent upon the Executive Branch to so advise the Congress and to request a supplemental appropriation.

$ $ $ $ $ $ $

TITLE: Funding for Projects under Section 208(f)

DATE: July 9, 1973

This memorandum is in response to inquiries which have been received concerning the funding mechanism under Section 208 of the FWPCA Amendments of 1972.

FACTS

Section 208 of the FWPCA Amendments of 1972 (33 USC 1288) requires the governors of the States to designate, with the approval of the Administrator, planning agencies to develop waste treatment management plans for certain areas with substantial water quality control problems. Designation of such agencies must take place within 180 days of publication of EPA guidelines identifying the water quality problem areas. Within one year of designation, the planning agency must have a planning process in operation; within two years after the planning process is in operation, it must be submitted to the Administrator for approval. Section 208(f)(1) states:

> "The Administrator shall make grants to any [approved planning agency] for payment of the reasonable costs of developing and operating a continuous areawide waste treatment management planning process. . . ." (emphasis supplied).

Section 208(f)(2) specifies that the amount of any such grant shall be 100% of the costs of developing and operating the planning process for fiscal years 1973 through 1975, and 75% thereafter. Planning agencies must submit a grant proposal to the Administrator for approval. Section 208(f)(3) states that the Administrator's ". . . approval of that proposal shall be deemed a contractual obligation of the United States. . ." for payment of the Federal contribution. Not to exceed $50 million, $100 million and $150 million are authorized for appropriation for fiscal years 1973, 1974, and 1975, respectively, to fulfill the "contractual obligations."

QUESTION

Under Section 208(f) of the Act, may the Administrator establish a limit, below authorizations, on the amount of funds which will be available for obligation for planning agency grants?

ANSWER

No.

DISCUSSION

The explicit language of Section 208(f)(1) of the Act requires the Administrator to make grants for costs of development and operation of areawide planning processes to any approved planning agency. Section 208(f)(2) requires the amount of each such grant to be 100% of costs for certain fiscal years. The mandate that the Administrator "shall" make such grants, in such amounts, is uncommon in Federal grant legislation, and cannot be read to mean less than what it obviously says. EPA is presently on record as having adopted such an interpretation. On December 13, 1971, the Administrator sent a letter to Representative Blatnik, Chairman of the House Committee on Public Works, expressing the formal comments on the agency on H.R. 11896 which contained, in Section 208(f)(1), the precise language now found in Section 208(f)(1) of the FWPCA Amendments. The letter stated:

> "EPA would be required to provide financial assistance to designated planning agencies, in amounts equal to 100% of their planning costs in each of the first four years. . . we strongly oppose 100% Federal funding of these planning costs. If Federal financial assistance for such activities is to be provided, substantial State and local matching is essential." A Legislative History of the Water Pollution Control Act Amendments of 1972, 93rd Cong., 1st Sess. (hereinafter "History"), p. 841 (see also p. 1196) (emphasis supplied).

H.R. 11896 was not amended to satisfy EPA's objections; in fact, the Act as passed goes farther than H.R. 11896 to include the "contractual obligation" language found in Section 208(f)(3). This concept was derived from S. 2770, which included the contractual obligation provision in different form. The "contractual obligation" provision emphasizes the non-discretionary nature of the areawide planning grant. While this provision cannot make the mandatory duty to award such grants any more mandatory, it does evidence Congress' strong intent to assure funding for areawide planning:

> The Senate bill authorized a percentage of the total construction grant authorization as contract authority for funding the regional waste management planning aspects of this legislation. The conferees agreed on a separate authorization included in section 208 but provided that the funds thereunder would be available in the form of contract authority so as to expedite implementation of this vital section. The degree to which the Administrator takes immediate action to implement this section will be convincing evidence of the commitment of the Environmental Protection Agency to early and effective implementation of the water quality management policies established by this legislation."

Discussion by Sen. Muskie, History, p. 169.

We are aware that the agency has taken a different policy position regarding the language of Section 205(a) of the Act, which states that sums authorized for treatment works construction grants "...shall be allotted...." Less than full authorized sums were allotted. However, that action was taken pursuant to Presidential direction, and was based upon considerable legislative history related specifically to Section 205(a) which appears to provide the Administration with discretion to allot less than full sums authorized for construction grants. Absolutely no such legislative history exists which would support a similar approach to grants under Section 208; indeed, the Administrator's letter quoted above (which is part of the legislative history of Section 208) contraindicates such policy.

It should also be noted that merely because the agency requests appropriations of less than full authorized sums, or Congress initially appropriates less sums than appear needed to fund awarded grants, there is no obviation of the Administrator's duty to award a grant in circumstances where Section 208 requires an award. By inclusion of the "contractual obligation" authority in Section 208(f)(3), Congress has obligated itself to appropriate all amounts needed (within authorized limits) to fund grants which, by virtue of Section 208(f)(1), the Administrator is obligated to make. It is therefore mandatory for the agency to request an appropriation for the amount actually needed to fulfill outlay requirements of awarded grants. Any request for a lesser appropriation based upon initial outlay estimates cannot serve as a limitation on grant awards.

To the extent spending controls exist at all under Section 208(f) (after an agency has been approved), they derive from the authority in 208(f)(1) to pay "...the reasonable costs of developing and operating a continuing areawide waste treatment management planning process..."(emphasis supplied). Neither the statute nor legislative history discusses the term "reasonable costs." The Administrator thus has some discretion to determine the kinds and amounts of costs which are reasonably required to develop and operate a planning process meeting the requirements of Section 208(b).

We wish to emphasize that mere approval by the Administrator of a designated planning agency does not, in and of itself, constitute a commitment to make a grant to the agency. Section 208(f)(3) requires the approved agency to submit a grant proposal to the Administrator, and it is only upon approval of that proposal that the United States becomes contractually obligated to pay the costs of the planning process. To avoid misunderstandings, it would be appropriate to specify in the document approving the designated agency that such approval does not contstitute grant award.

§ § § § § § §

SEWAGE TREATMENT WORKS CONSTRUCTION FUNDS UNDER FWPCA, AMENDED

TITLE: Availability of Sewage Treatment Works Construction Funds

DATE: April 12, 1973

Mr. Dan W. Lufkin
Commissioner
State of Connecticut
Department of Environmental Protection
State Office Building
Hartford, Connecticut 06115

Dear Mr. Lufkin:

The Administrator has asked me to respond to your letter of January 30, 1973, regarding availability of sewage treatment works construction funds under the Federal Water Pollution Control Act Amendments of 1972 (P. L. 92-500). Please accept my apologies for the delayed reply.

I wish to express the sincere appreciation which both the Administrator and I feel for your personal efforts and the efforts which Connecticut has made toward accomplishing a sound water pollution control program. Your letter reflects a justifiable pride in those efforts.

You have suggested two methods of speeding the construction of sewage treatment works in Connecticut. One suggested method would require the allotment to Connecticut of an additional $100 million of Federal funds. Such an approach, however, would not be permissible under the FWPCA Amendments. Section 205(a) of the Act provides that allotments among the states for Fiscal Years 1973 and 1974 must be made on the basis of Table III of House Public Works Committee Print No. 92-50. Congress particularized in that document the specific dollar amounts needed for construction in each state. The dollar figures were translated by EPA into percentage figures for purposes of determining allotments, so that each state could be allotted an amount directly proportional to the dollar figures contained in the committee print. All available sums for treatment works construction in FYs 1973 and 1974 have been allotted on that basis. I do not believe that the Act permits an additional allotment to adjust the proportional share of a single state.

As you are no doubt aware, Sections 205(a) and 516(b) of the Act provide that allotments for FY 1975 will be available by January 1, 1974. Such allotments will be made on the basis of new "needs" survey which is to be submitted to, and approved by, Congress.

Your second suggestion relates to "prefinancing" the Federal share of a project's construction costs. From your mention of "contract authorization," we assume you mean that EPA would approve plans, specifications and estimates for a proposed project (thereby obligating the United States to payment of 75% of project costs) while initially paying none of, or less than, the 75%

Federal share of project costs. The municipality would obtain from the state, or provide from its own funds, "prefinancing" of the unpaid Federal share, in anticipation of eventual reimbursement.

Except in the very limited circumstances discussed below, the above-described approach is not a permissible mechanism for funding treatment works projects under the new statute. The Act as amended by P.L. 92-500 no longer contains authority for establishment of a class of partially funded reimbursable projects. Although Section 8 of the old law authorized the creation of a pool of reimbursement claims, this authorization was not carried forward into the FWPCA Amendments. The sole authority for reimbursement in Title II of P.L. 92-500 is contained in Section 206, the provisions of which (except for Subsection 206(f)) related only to reimbursement of projects initiated prior to July 1, 1972.

Subsection 206(f) is of limited utility because it provides that the Administrator may approve only a project undertaken without the aid of any Federal funds, and may commit funds in advance to the project after the exhaustion of available allotments only to the extent ". . . an authorization is in effect for the future fiscal year for which the [applicant] requests payment, which authorization will insure payment without exeeding the State's expected allotment from such authorization." At this time your state of Connecticut allotments for FY 1973 and 1974 have not been exhausted and it is not possible to determine what your expected state allotment will be in the only remaining year (FY 1975) for which there is an authorization under the statute, so there is no basis for utilizing the very limited authority of Section 206(f).

We recognize and appreciate your desire to reverse the deterioration of Connecticut's waters in the most efficient and expeditious manner. Implementation of a "phased" approach to construction, (see 40 CFR 35.920-3), as authorized by Congress, should be of substantial assistance in meeting the goals reflected in your suggestions.

Sincerely yours,

John R. Quarles, Jr.
Assistant Administrator for Enforcement
and General Counsel

§ § § § § § §

TITLE: Allotment of Funds for Construction of Sewage Treatment Works

DATE: February 21, 1973

Mr. J. Michael McCloskey
Executive Director
Sierra Club
Mills Tower
San Francisco, California 94104

Dear Mr. McCloskey:

I have received your letter of January 8, 1973, concerning the allotment of funds for construction of sewage treatment works under the Federal Water Pollution Control Act Amendments of 1972. Please accept my apology for the delayed response.

As you are aware, the President, by letter dated November 22, 1972, directed me to allot no more of the funds authorized by Section 207 of the Act than $2 billion for FY 1973 and $3 billion for FY 1974. The President's letter was quite specific concerning the reasons for his decision. In it, he indicated his resolve "to maintain a strong and growing economy without inflation or tax increases." He also stated that the sums allotted would "provide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt."

I believe that this administration can be proud of its record of commitment to cleaning up the Nation's waters. The President's record of spending requests transmitted to Congress emphasizes this commitment. In his four budget years, he has requested a total of over $5.2 billion for municipal wastewater treatment construction, nearly eight times the $665 million requested for the preceding four-year period. Allotments for 1972-1974 will total $8.9 billion overall, about three times as much as was appropriated in the preceding fifteen years.

Of vital concern to the President, and to me, are the potential effects of a higher rate of spending for treatment works construction than will be the case under the allotments made. Sewer construction costs have increased more than 120% over the last two decades, as compared with the 49% rise in the consumer price index. The increased demand created by large subsidies, together with the competition for scarce construction services, would force further price increases and would result in construction delays. Balancing the competing interest of fiscal responsibility and pollution control needs, the President has reached what I believe to be a sound compromise. In his letter to me, the President states, "I believe this course of action is the most responsible one one which deals generously with environmental problems and at the same time recognizes as the highest national priority, the need to protect the working men and women of America against tax increases and renewed inflation."

The President reiterated his commitment to cleaning up the Nation's waters in submitting his most recent budget to Congress. At that time, he stated that "the forward thrust of our environmental programs has not been altered. We will continue vigorous enforcement of laws and Federal regulations. . . a total of $ 0.1 billion has been set aside in a short period of time for waste treatment facilities. I believe that more funds would not speed our progress toward clean water, but merely inflate the cost while creating substantial fiscal problems.

I agree with your statement that an "immense effort" must be mounted and and sustained if we are to clean the nation's waters. We have undertaken such an effort in implementing the programs, standards and enforcement mechanisms established under the FWPCA Amendments.

Your letter requests EPA to prepare an environmental impact statement under the National Environmental Policy Act (NEPA) in connection with the allotment of less than the full sums authorized by Section 207 of the FWPCA Amendments. I do not believe that NEPA requires such action, which would be inconsistent with Section 511(c) of the FWPCA Amendments, and its legislative history, and with NEPA itself as that statute has been interpreted and applied by the courts.

Section 511(c) of the FWPCA Amendments states in pertinent part that:

> "Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by Section 201 of this Act. . . no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of (NEPA). . . ."

You do not argue that allotments of less than full authorized sums were "the provision of Federal financial assistance" for constructing treatment works, and thus subject to NEPA's requirements; rather, as I understand it, your contention is that our allotment was not an action "taken pursuant to this Act" within the terms of Section 511(c)(1). You further state that Section 511(c)(1) would not in any event operate to excuse EPA from compliance with Section 102(2)(D) of NEPA, which requires agencies to study, develop and describe appropriate alternatives to their actions.

I do not think it can reasonably be argued that my action in allotting funds under Section 205 and 207 of the FWPCA Amendments was not an action "taken pursuant to" the Act. I have consistently advanced as authority for my action the flexibility and discretion clearly afforded by Sections 205 and 207 of the FWPCA Amendments. I recently discussed this matter in some detail before the Senate Committee on Government Operations.

As you note in your letter, the question whether the FWPCA Amendments authorize an allotment of less than full sums authorized by Section 207 is the subject of litigation. Should the courts conclude that the Act does not confer such authority upon me, I may be ordered to allot the full sums authorized by Section 207. I do not understand your letter to include a request that I prepare an environmental impact statement in that event. I believe our obligation under NEPA with respect to sewage treatment plants is to prepare environmental impact statements where there are significant adverse impacts in connection with individual plants or groups of plants. See Howard v. EPA, 4 ERC 1731, __ F Supp __ (W.D. Va.) September 14, 1972. I do not believe this obligation extends to the preparation of such statements in connection with the overall decision on level of funding. The decision in Natural Resources Defense Council v. Morton, 458 F2d 827 (D.C. Cir., 1972) makes it clear that the impact statement need not be written at the time of an overall program decision, but rather may be written in connection with specific implementing decisions. Compliance with NEPA thus may be achieved by preparation of impact statements with respect to the effect on a particular environment of individual plants.

Furthermore, I do not think that the clear purpose of Section 511(c)(1) - to relieve EPA of the impact statement requirement except with regard to specific treatment works grants - may be defeated by resort to Section 102(2)(D) of NEPA, or other provisions of that Act. Senator Muskie, one of the conferees for the FWPCA Amendments, and the floor manager of the bill in the Senate, stated:

> "Because the language of 511(c)(1) speaks of "major Federal actions significantly affecting the quality of the human environment" a phrase which only appears in section 102(2)(C) of NEPA some will argue that the conferees intended to limit their attention to Section 102(2)(C) and that all of the other provisions are therefore meant to be applicable to actions of the Administrator. . . it is the clear intent of conferees of both houses. . . that all of the provisions of NEPA should apply to the making of grants under Section 201 and the granting of a permit under section 402 for a new source and that none of the provisions of NEPA would apply to any other action of the Administrator. . . . If the actions of the Administrator were subject to the requirements of NEPA, administation of the Act would be greatly impeded. . . ." 118 Cong. Rec. S. 16878 (emphasis supplied).

With regard to the specific impact of Sections 102(2)(C) and (D) of NEPA, Senator Muskie further stated:

> "The conferees determined that it would be useful to apply, in the case of waste treatment grants, the requirement of NEPA included in sections 102(2)(C) and 102(2)(D). Application of these sections would cause the Administrator to consider "alternative" methods of waste treatment which may have the beneficial effect of decreasing blind reliance on "secondary treatment" and stimulate more innovative methods of waste treatment." Id.

Section 102(2)(D) requires that Federal agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . ." It is clear both from the legislative history of NEPA (see e.g., Sen. Rep. 91-236, 91st Cong. 1st Sess., p. 21) and from the foregoing discussion of Section 511(c)(1) of the FWPCA Amendments that Section 102(2)(D) is intended to apply to conflicts over the use of natural resources, not to conflicts over the use of budgetary resources.

For the foregoing reasons, I do not believe that EPA is required to prepare environmental impact statements under NEPA in connection with the allotment of funds under Sections 205 and 207 of the FWPCA Amendments.

I note your suggestion concerning the maximum use of authority Congress has given in Section 201 of the Act for encouraging waste treatment through recycling facilities, land disposal, wastewater reclamation, and similar techniques. We are aware of the potential of such techniques, and are presently encouraging such activities. The Agency currently has a number of surveys, studies and a major demonstration grant project underway relating to agricultural and other aspects of land utilization for wastewater.

I wish to emphasize that I appreciate and share your organization's concern that the Nation's waters be cleaned in the most expeditious and efficient manner. I also wish to assure you of this Agency's commitment to that goal, and to the purposes of NEPA and the FWPCA Amendments.

Sincerely yours,

William D. Ruckelshaus
Administrator

§ § § § § § §

TITLE: Availability of Unallotted Portions of Construction Grants Contract Authority for FY 1973 and 1974

DATE: December 15, 1972

This memorandum is in response to your undated memorandum (received by us on December 6, 1972), subject as above.

FACTS

Section 205 of the Federal Water Pollution Control Act, as most recently amended by PL 92-500, states in pertinent part (emphasis added):

> "(a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except

> that *the allotment* for fiscal year 1973 shall be made not later than 30 days after the date of enactment [October 18, 1972] of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him. . . ."
>
> "(b) (1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the *date* of such *allotment*. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. . . ."

On November 28, 1972, the Administrator promulgated a regulation allotting $2 million to the States out of the $5 billion authorized to be appropriated for Fiscal Year 1973, and further allotting $3 billion to the States out of the $6 billion authorized to be appropriated for Fiscal Year 1974.

QUESTION

May the $3 billion unallotted but authorized for Fiscal Year 1973, and the $3 billion unallotted but authorized for Fiscal Year 1974, be allotted to the states subsequent to the first allotment for FY 1973 and FY 1974?

ANSWER

No. The statute contemplates only one allotment for each fiscal year.

DISCUSSION

The emphasized language in the portions of Section 205 quoted above indicates a legislative intent that there be one allotment for each fiscal year. The amendment to the House version of Section 205, offered by Representative Harsha at the Conference Committee and adopted by that Committee and by both Senate and House, served to allow the Executive Branch to allot less than the full amount authorized for any fiscal year. It did so by deleting the word "all" at the start of the House version of Section 205(a), and by inserting the words "not to exceed" at several points in Section 207. Prior to the adoption of the Harsha amendment, the bill clearly contemplated *one* allotment of the *entire* authorized amount for each year; the Harsha amendment did not affect the intent that there be *one* allotment.

§ § § § § § §

TITLE: Use by Minnesota of Unexpended FY 1972 Program Grant Funds

DATE: June 13, 1973

By memorandum dated May 3, 1973, Mr. V.V. Adamkus, Deputy Regional Administrator, Region V, has brought to our attention certain matters relating to disposition of approximately $79,000 in unexpended FY 1972 program grant funds in the possession of the Minnesota WPCA. Specifically, Minnesota wishes an extension of the time within which all states were required to obligate FY 1972 grant funds. Further, it appears the State now wishes to use the funds to implement requirements of the FWPCA Amendments.

In a memorandum of May 15, 1972, to all Regional Administrators, Mr. Nicholas Golubin (then Director of Air and Water Programs) established a "cut-off" date of September 30, 1972, for obligation of FY 1972 program grant funds. Mr. Golubin's memorandum was based in part upon advice of this office that we had no legal objections to (a) permitting expenditure of these funds after June 30, 1972, and (b) administratively extending the period of then-current allotments, ". . . provided that this applies uniformly to all of the States."

By memorandum dated February 28, 1973, Robert Sansom, Assistant Administrator for Air and Water Programs, advised the Regional Administrator, Region V, that ". . . because of exceptional circumstances in acquiring consultant services to supplement their water quality management planning efforts . . . Minnesota has not been able to meet the administrative deadline of September 30, 1972. . . ." He noted "ample justification" to grant an exception, and requested that regional personnel select a "mutually agreeable date" for obligation and expenditure of the funds in question. Pursuant to his request, by letter dated March 15, 1973, Minnesota was advised that ". . . an exception has been allowed, and the funds are available for expenditure. These funds should be obligated for the purposes they were originally granted as soon as possible [sic]" (emphasis supplied).

By letters dated March 30 and April 25, 1973, Minnesota responded to the foregoing letter, proposing a new and different use of the $79,000. Minnesota originally proposed to use the funds for consulting services for river basin planning, but stated that the funds were not so used "due to pending changes in federal requirements." Now Minnesota plans to use the funds to add personnel to "assist in implementing the 1973 Federal Act." In addition, they have requested that they be allowed to obligate the funds over a period of eight months, primarily for salaries.

While the funds involved are "no-year" funds, which remain available until expended, the agency undertook to encourage expedient use of the funds for valid program objectives by establishing a reasonable time limit for expenditure. As we understand it, the other states made good-faith efforts to comply with the requirement, and were successful. Minnesota's proposal, if approved, would result in an extension of time beyond the original deadline of about 16 - 17 months. In our opinion it is not fair or equitable to allow one state such exceptional treatment when other states expended considerable effort to comply with the deadline. Such an approach would be damaging to the credibility of future such administrative requirements.

Accordingly, we recommend against acceptance of the Minnesota proposal for extension of the time period or alteration of the purpose for which the funds were originally made available. If Minnesota has not been able to utilize the supplemental FY 1972 funds within the established time and for the purpose originally intended, the funds should be recaptured or credited against current program grant payments to the state.

$ $ $ $ $ $ $

TITLE: Funding Under Delaware's "Phased" System

DATE: February 20, 1973

Mr. John C. Bryson
Acting Secretary
Department of Natural Resources
  and Environmental Control
Dover, Delaware 19901

Dear Mr. Bryson:

We have received your telegram of February 2, 1973, requesting our advice as to whether the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) permit funding of projects under the "phased" system developed by the State of Delaware. We have now had an opportunity to explore fully the issues of statutory interpretation raised by your inquiry.

Essentially, the Delaware plan is designed to widen the distribution of treatment works construction funds. The plan provides that each eligible project in the State would receive a certain percentage of the State's allotment. Although the amount of funds for each project would vary in relation to its relative priority among other projects in the State, most, if not all, would receive Federal funding in an amount less than 75% of costs. Each applicant for a grant would have to "waive" its right to full Federal funding, but with the expectation that the Federal share would be increased to 75% in future years in the event Federal funds become available. In our view, this aspect of the Delaware plan is not a permissible mechanism for funding treatment works projects under the new statute.

Section 202(a) of the Act states that the amount of a treatment works construction grant "shall be" 75% of the costs of construction. Under Section 203 of the Act, the Administrator's approval of plans, specifications and estimates for a project constitutes a contractual obligation of the United States for payment of the entire Federal share of the costs of the project. The full amount so obligated is simultaneously charged against the state's allotment of the total funds available under the Act for construction grants. The law thus clearly specifies both the amount of, and the sole means by which, Federal financial participation in a project shall be provided, and assures grantees that they will not be required to pay more than 25% of project costs.

The Delaware plan would be inconsistent with the purpose underlying the requirement that Federal financial participation be at the 75% level. Municipalities would have to provide their own funds to make up the difference between the costs of a project and the less-than-75% Federal share. The clear intent of the new Act was to obviate problems municipalities formerly had in coping with large financing requirements.

The plan would also require deviation from the funding mechanism contemplated by Section 203 of the Act, by creating a pool of equitable claims similar to the reimbursement claims which were authorized by Section 8 of the Act prior to amendment. As amended by P.L. 92-500, the Act no longer contains authority for establishment of a class of partially funded reimbursable projects.

The sole authority for reimbursement in P.L. 92-500 is contained in Section 206, the provisions of which (except for Subsection 206(f)) relate only to reimbursement of projects initiated prior to July 1, 1972. Subsection 206(f) provides only that the Administrator may approve a project undertaken without the aid of Federal funds, and may commit funds in advance to the project to the extent" . . . an authorization is in effect for the future fiscal year for which the [applicant] requests payment, which authorization will insure such payment without exceeding the State's expected allotment from such authorization."

We are aware that part of the legislative history of the amendments suggests approval of Delaware's approach. We believe, however, that there was some confusion regarding the effect of the amendments contained in the Act. The statute as amended clearly rejects the establishment of a new pool of reimbursable projects, and the apparent conflict between the provisions of the statute and statements in legislative history must be resolved in favor of what the statute itself says.

We recognize and appreciate your desire to reverse the deterioration of Delaware's waters in the most efficient and economical manner. Implementation of a "staged" approach to construction, as authorized by Congress, should be of substantial assistance in meeting the goals of the Delaware plan. Regulations relating to this "stated" approach will be published in the near future.

Sincerely yours,

John R. Quarles, Jr.
Assistant Administrator for
Enforcement and General Counsel

§ § § § § § §

TITLE: Funding Under Delaware's Phased Grants System

DATE: February 21, 1973

Questions have arisen regarding the effect of the Federal Water Pollution Control Amendments of 1972 (P.L. 92-500) upon the Delaware Phased Grants System, a fund allocation system which combines project priority determination with a system of waivers by grantees of part of their entitlement to Federal funding so that available funds may be spread farther than would otherwise be the case.

FACTS

The Delaware system was developed a year ago, and has been operative for about six months. Briefly, the system works as follows: Delaware establishes the relative priorities of all projects in the State on the basis of public hearings and evaluation by the State agency. A mathematical formula establishes the percentage of Federal funds which each project is "allotted" by the State, the percentage varying according to the number of projects to be funded and the relative priority of each. For example, if three projects are to be funded, the project having highest priority would receive 50% of available funds, the second would receive 26%, and the third, 24%. If forty projects will be funded, the project with highest priority would receive 10%, the next four would receive 5%, and all others would receive 2%. Theoretically, such a given percentage of total Federal funds could equal or even exceed the maximum 75% Federal participation in costs of a given project permissible under Section 202(a) of P.L. 92-500; however, that complication is avoided in Delaware, since the State's system contemplates spreading funds to enough projects so that no one project will receive even its full 75% entitlement in a fiscal year. The plan provides that a project's entitlement will continue until it receives a total of 75% Federal funding. Delaware has developed a waiver agreement by which the applicant "agrees to accept" a specified amount of Federal funding, "even though the original grant request was" larger. The applicant must also assure that it has funds sufficient to complete the project, and further agrees as follows:

> "It is understood that the project will retain its priority until the full entitled grant is received. It is further understood that the project will receive only the amount allocated by [the State agency] in any given Fiscal year, contingent upon Federal appropriations, and that the amount may be only a portion of the full entitlement."

The Delaware system was designed in the context of the Federal Water Pollution Control Act prior to its amendment by P.L. 92-500. Although it appears to have been an appropriate mechanism under the old Act, the question has been raised as to whether EPA should approve the system for use under P.L. 92-500.

Inquiry has also been made concerning a problem raised by implementation of the system during Fiscal Year 1972. Utilizing the plan, Delaware, prior to October 18, 1972 (the date of enactment of P.L. 92-500), authorized the initiation of a sizeable number of projects which, pursuant to Section 202 of P.L. 92-500, are eligible for an increase in Federal assistance to the 75% level. However, Delaware's allotment of funds for payment of this increase is insufficient, and the State agency has inquired whether it may use the "contractual obligation" authority of Section 203 of the Act to increase the grants to the 75% level.

QUESTIONS

1. Do the 1972 Federal Water Pollution Control Act Amendments permit a State to certify treatment works projects for a Federal grant of less than 75%, subject to an increase of the Federal share to the 75% level as funds become available?

2. May the contractual obligation authority of Section 203 of the 1972 Amendments be used to increase to 75% the level of Federal participation in grants authorized from FY 1972 or earlier funds?

ANSWERS

1. No.

2. No.

DISCUSSION - QUESTION 1

Our principal objection to the Delaware system relates to the result which would flow from initially funding projects at less than 75% while indicating that Federal financial participation will be increased to 75% if funds become available. The result would be the creation of a pool of equitable claims similar to the reimbursement claims created under Section 8 of the old Act, but quite clearly no longer permissible under P.L. 92-500.

Although the Delaware system does not comport with the scheme of the new law, the matter is complicated by certain legislative history which states approval of Delaware's approach:

> "When funding the construction of waste treatment plants, the Administrator, upon the request of a State, should encourage the use of a phased approach to the construction of treatment works, and the funding thereof, on a State's priority list. Such a phased program, which the committee notes has been developed and approved in the State of Delaware, has enabled the State to accelerate the construction of sewage treatment facilities, and thus accelerate the attainment of clean water."
>
> (Conference Report 92-1465 (9/28/72)), p. 111.

We believe that the foregoing language of the Conference Report indicates some confusion concerning the effect of the amendments contained in P.L. 92-500. The statute as amended implicitly rejects the establishment of a new pool of reimburseable projects, and the apparent conflict between the provisions of the statute and statements in legislative history must be resolved in favor of the statutory language.

Section 8(c) of the Act prior to amendment by P.L. 92-500 gave the Administrator discretion to reimburse States or localities for funds expended for a project:

> ". . . which was constructed with assistance pursuant to this section but the amount of such assistance was a lesser per centum of the cost of construction than was available pursuant to this section . . . to the extent that assistance could have been provided under this section if adequate funds had been available."

Title II of P.L. 92-500 contains no such authority for establishment of a class of partially funded reimbursable projects. The only mention of reimbursement is contained in Section 206 of the new Act, the provisions of which (save for Subsection 206(f)) relate only the reimbursement of projects initiated prior to July 1, 1972.

It has been suggested that Section 206(f) of P.L. 92-500 provides a reimbursement mechanism comparable to that formerly contained in Section 8. This is not the case. Briefly stated, 206(f) provides that municipalities may proceed with projects after a State's fiscal year allotment has been obligated. Section 206(f) applies only to advanced construction of projects undertaken". . . without the aid of Federal funds . . ." (emphasis supplied). The Administrator may approve such a project, and commit funds to it in the manner required for all projects, only to the extent there are grant authorizations available for subsequent fiscal years. "It is the intent of this section that projects approved to proceed without Federal funds will be fully covered by a State's expected allotment." House Report No. 92-911 (3/11/72), pp. 94-5. Section 206(f) does not establish a general reimbursement mechanism such as that formerly contained in Section 8(c); rather, it is a much more limited authority, and contemplates obligating the Government to pay the Federal share only of projects approved for advanced construction within the limits of identifiable future fiscal year authorizations.

Projects eligible for assistance under 206(f) are those begun "without" Federal assistance, which suggests that the contractual obligation authority of Section 203(a) was not intended for use for less than the full amount of assistance to which a project is entitled. In other words, a project must be fully funded or not at all, so that no reimbursement "debts" are created for payment under Section 206(f). We note that Delaware contemplates that each project will receive a portion of the State's allotment, so that no project for which 206(f) funds would be sought would be initiated "without" Federal funding. Assuming *arguendo* that such partial funding were permissible, we note that the Delaware plan makes no provision for insuring that each project initiated would be fully covered by the State's allotment from available future authorizations. Consequently, the plan would permit the initiation of a sizeable number of partially-funded projects, each of which would be promised further Federal funding assistance only when, and if, available. By establishing such a pool of reimbursement "debts", the Delaware plan would have the effect of reinstating the flawed funding mechanism formerly established under the Act.

Our reservations concerning the Delaware plan are compounded by circumstances attending the "waiver" of Federal financial participation at the 75% level in the costs of a project. Pursuant to Section 202(a) of the Act, a grantee may not be required to fund more than 25% of the costs of a project. One may conceive of circumstances in which a grantee would wish to undertake a truly voluntary waiver of its full 75% Federal entitlement - e.g., in order to receive State or other assistance at the 40% level - denial of which would serve neither the purposes of the Act nor the interests of the grantee.

Under the Delaware plan, however, municipalities may have to use their own funds to make up the difference between the cost of a project and the less-than-75% Federal share; there is no explicit promise of State or other non-Federal assistance underlying the waiver, which municipalities must sign to receive any funding at all.

One purpose of the new Act, according to its legislative history, is to obviate problems municipalities had under the former law in coping with the large "matching" requirements which resulted both from the provisions of Section 8 and from the frequent nonavailability of Federal funds.** Thus, again, Delaware's plan appears to contemplate a reversion, under State pressure, to the discarded funding mechanisms of the former law.

The thrust of the discussion so far finds further support in the system of establishing priorities for funding of projects under the Act. Pursuant to Sections 204(a)(3) and 303(e)(3)(H), the Administrator, before approving grants for any project in a State, must determine that the project has been certified by the State as entitled to priority over other projects in the State. Implicit in this requirement is the Congressional intention that those projects highest on a State's priority list be funded first. Delaware's system contemplates that projects entitled to the highest priority will initially receive more funds, while other projects will be contemporaneously funded, though at a lower level. Beyond the initial allocation of funds, both high priority and lower priority projects are treated alike - that is, both are expected to await "reimbursement" from future Federal funds, if available. Thus, Delaware's plan does not fully meet the obvious purpose of Sections 204(a)(3) and 303(e)(3)(H) - that those projects most needed in a State be completed first.

** "With a guaranteed 75% Federal grant for the cost of projects, the effective rate of community obligation under the [Act] will be reduced from a maximum of 70% to a maximum of 25%. This should reduce the need for an alternative assistance mechanism." (Senator Muskie, Congressional Record, 10/4/72, p. 16879).

"One of the most important provisions of this legislation is that increasing the Federal share for the construction of sewage facilities to 75% of the total costs. Present law provides a maximum Federal contribution of 30%, except for grants in States which are able to contribute 25% of project costs. Communities in our State of West Virginia could seldom raise the required 70% local share of construction costs. . . ." (Senator Randolph, Id., pp. 16879-80).

"As a result of an amendment I offered in conference, the Federal share of the cost of any public waste treatment work would be 75%, with the State and municipality contributing the remaining 25%. This assured high percentage of funding should eliminate the situation we have witnessed in which States and localities postpone the start of needed construction programs while legislation is pending to provide for a more generous Federal share." (Senator Cooper, Id., p. 16881).

In considering the legislative history indicating approval of the Delaware plan, quoted supra, it is important to note the Congressionally-approved "phased" system under which each stage in the construction of a waste treatment facility may be treated as a separate "project" for purposes of project approval and funding:

> "The conferees want to emphasize the complete change in the mechanics of the administration of the grant program that is authorized under the conference substitute. Under existing law and procedure, the Environmental Projection Agency makes the first payment upon certification that 25 percent of the actual construction is completed. The remaining Federal payments are also made in reference to the percentage of completion of the entire waste treatment facility. This results in applicants absorbing enormous interest expense and other costs while awaiting the irregular flow of Federal funds. Under the conference substitute, which is a program modeled after the authority and procedures under the Federal Air Highway Act, each stage in the construction of a waste treatment facility is a separate project. Consequently, the applicant for a grant furnishes plans, specifications, and estimates (PS&E) for each state (which is a project) in the overall waste treatment facility which is included in the term "construction" as defined in section 212. Upon approval of the PS&E for any project, the United States is obligated to pay 75 percent of the costs of that project. Thus, for instance, the applicant may file a PS&E for a project to determine the feasiblity of a treatment works, another PS&E for a project for engineering, architectural, legal, fiscal, or economic investigations, another PS&E for actual building, etc. In such a program, the States and communities are assured of an orderly flow of Federal payments and this should result in substantial savings and efficiency."
>
> (Conference Report 92-1465 (9/28/72)), p. 111.

Congress thus carefully described a mechanism for spreading funds, promoting efficiency, and increasing project "starts," which are also fundamental goals of the Delaware system. Delaware can fulfill those goals in large part by implementation of the system developed by Congress.

It may be significant that the language approving of the Delaware approach appears on the same page as the material quoted above, removed from it by one paragraph; it is conceivable that the Delaware system was erroneously thought to be an example of the approach which Congress intended EPA to take.

DISCUSSION - QUESTION 2

This precise question was addressed in our memorandum of November 16, 1972, to the Assistant Administrator for Air and Water Programs. A copy is attached. The memorandum concludes that the Section 203 constructural obligation authority may not be used to increase to 75% any Federal grants made in FY 72 or prior years.

§ § § § § § §

TITLE: "Advanced Construction" Grant Authority Pursuant to Section 206(f)

DATE: August 27, 1973

Your memorandum of July 24, 1973, requests advice whether the State of Hawaii may utilize "advanced construction" grant authority pursuant to Section 206(f) of the FWPCA Amendments of 1972. We concur in your conclusion that Hawaii is not eligible to do so at this time.

By the terms of the statute, Section 206(f) "advanced construction" authority is extremely limited. Section 206(f) itself provides that the authority may not be utilized until all funds previously allotted to a State" . . . have been obligated under section 203 of the Act. . . ." We understand that Hawaii has not yet fully obligated its FY 1973 and 1974 allotments. The last sentence of Section 206(f) states that "advanced construction" may not be authorized unless there is in effect for the future fiscal year from which funds would be drawn" . . . an authorization . . . which . . . will insure payment without exceeding the State's expected allotment from such authorization." The only future year for which there is an authorization in Section 207 of the Act is for FY 1975. (Section 205(a) requires that Congress determine the FY 1975 state allotments prior to January 1, 1974, on the basis of the current survey of construction needs pursuant to Section 516(b) of the Act, so that there will be no need for Section 206(f) authorizations unless all FY 1973 and 1974 allotments available to a State are obligated substantially prior to January 1, 1974.) Also, a state which desires to utilize Section 206(f) authority should insure that its project priority list is submitted accordingly, since the priority requirements of 40 CFR 35.915 (38 F.R. 5331) would necessarily be applicable to the approval of projects for payment from later-year funds. In addition, any projects approved for funding pursuant to Section 206(f) would necessarily have to comply with the "best practicable treatment" requirement of Sections 201(g)(2)(A) and 301(b)(2)(B); regulations to define this requirement have not yet been promulgated. Finally, no project would be eligible for payment pursuant to Section 206(f) unless construction on the project had been initiated (as defined in the last sentence of 40 CFR 35.9053, published at 38 F.R. 5330, on February 28, 1973) after (a) July 1, 1972 and (b) written approval pursuant to Section 206(f).

Among the materials submitted by you to this office was an article from the Honolulu Star-Bulletin which indicates that there may be some misunderstanding on the part of some Hawaii officials concerning "reimbursement" authority under the FWPCA. The "reimbursement" authority contained in Section 8 of the former FWPCA was not carried forward in the 1972 FWPCA Amendments except for that found in Section 206, which relates only to (a) reimbursement for costs of certain projects on which construction was initiated prior to July 1, 1972, and (b) the very limited "advanced construction" authority discussed above.

§ § § § § § §

TITLE: Industrial Waste Construction Cost Recovery

DATE: February 27, 1973

FACTS

Section 204(b)(1)(B) of the Federal Water Pollution Control Act Amendments of 1972 requires grantees to recover from industrial users the cost of treatment works allocable to the treatment of industrial wastes, to the extent attributable to the federal share. Present EPA regulations (35 F.R. 128, July 1, 1970), applicable to Section 8 of the former statute, require recovery of the grantee's share.

QUESTION

Can EPA continue to require recovery of the non-federal share under the Act as amended?

ANSWER

No; Congress has not delegated to EPA the authority to impose a requirement of this nature and none may be inferred.

DISCUSSION

A basic problem is whether the rules which EPA imposes upon grantees must be based upon statutes and Congressional delegations of rule-making authority or whether EPA may impose any reasonable conditions which do not actually contradict a statute.

> It is settled law that the United States has the authority to fix the terms and conditions upon which the money allotments to states shall be disbursed.
> (U.S. v. Frazer, 317 F. Supp. 1079, 1083 (1970)).

The cases establish, however, that Congress possess the power to impose substantive conditions upon grant recipients, and in the absence of a statutory delegation of rule-making authority we may infer that Congress alone possesses it. We have searched in vain for judicial support for the notion of implicit administrative authority to impose substantive conditions on grants in aid.

Section 204(b)(1)(B) expresses a specific Congressional intent with respect to industrial cost recovery; namely, that no construction funds may be granted unless the recipient has made provision for recovery of the federal share of construction cost attributable to industrial use. Congress debated the cost recovery requirement at some length (see *Cong. Rec.*, March 27, 1972, H 488-90, 2504-06; March 28, 1972, H 628-33; and October 4, 1972, S16881-9, H9118, 9133) and we may infer that if recovery of the local share was intended Congress would have so provided. Section 204 contains no delegation provision authorizing EPA to promulgate general rules for grant recipients, but directs only that EPA publish guidelines to interpret and apply the provisions for user charges and industrial cost recovery and promulgate regulations respecting the proportion of the grantee's retained amount of recovered cost to be used for future expansion and reconstruction. In the context of HEW guidelines with respect to non-discrimination in programs of federal aid to education, the Fifth Circuit in *U.S. v. Jefferson County Board of Education*, 372 F2d 836, 837 (1966) indicated that guidelines must be within the framework of established law:

> The guidelines have the vices of all administrative policies established unilaterally without a hearing. Because of these vices the courts, as the school boards point out, have set limits on administrative regulations, rulings, and practices; an agency construction of a statute cannot make the law; it must conform to the law and be reasonable. To some extent the administrative weight of the declarations depends on the place of such declarations in the hierachy of agency pronouncements extending from regulations down to general counsel memoranda and inter-office decisions.

Section 501(a), which authorizes the Administrator to prescribe "such regulations as are necessary to carry out his functions under this Act;" likewise seems to fall short of authorizing the imposition of local cost recovery as a condition of receiving funds. While we do not presume to list all the rules which may be considered "necessary" to carry out the Act, we cannot believe that the prohibition against federal subsidies to industry authorizes EPA to prohibit purely local subsidies. While EPA's discretion as to the award or denial of Title II funds seems rather broad, inasmuch as the Administrator must approve an applicant's "plans, specifications, and estimates" before the obligation to pay arises, we foresee little likelihood that the courts would be much impressed by the argument that construction grants are a "privilege", rather than a "right", and that EPA may consequently impose such conditions as it pleases. (See Skoler, Lynch & Axilbund, *Legal and Quasi-Legal Considerations in New Federal Air Programs*, 56 Geo. L. J. 1144 (1968). The "rights-privileges" argument seems particularly weak when we consider that a municipality may be subjected to enforcement proceedings under Section 309 if it does not construct adequate treatment works.

Although we need not determine the validity of the cost recovery regulations implementing Section 8 of the former statute, a strong argument can be made that the regulations were valid. Under the former statute the Administrator's discretion to award or deny funds was probably broader than it is now, and Congress had not spoken with respect to cost recovery.

§ § § § § § §

TITLE: Great Lakes Area Treatment Works Projects

DATE: June 22, 1973

FACTS

Your memorandum of March 26, 1973, notes that it is agency policy, under the Federal Water Pollution Control Act Amendments of 1972, to encourage certain states to give priority to treatment works projects which are needed to satisfy the commitments made by the United States in the U.S. - Canada Great Lakes Water Quality Agreement of April, 1972 (hereinafter the "Agreement"). You have inquired whether the Administrator may strengthen that policy by requiring Great Lakes states to establish procedures in their project priority systems which would provide preference for projects needed to comply with the Agreement.

QUESTION

May the Administrator require a State to establish priority evaluation criteria which would favor treatment works projects needed to satisfy commitments made by the U.S. in the Great Lakes Water Quality Agreement?

ANSWER

Yes. However, we urge policy consideration of the propriety of such a requirement. See discussion.

DISCUSSION I

Resolution of your inquiry first requires examination of the relevant provisions and interrelated policies of the Boundary Waters Treaty of 1909, the Agreement, and the FWPCA Amendments.

A. The Boundary Waters Treaty.

Article IV of the Boundary Waters Treaty of 1909 (33 Stat. 2448) between the U.S. and Canada states in pertinent part as follows:

> "It is . . . agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

The term "boundary waters" is defined in the Preliminary Article of the treaty as follows:

> ". . . boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between [the U.S. and Canada] passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

B. The U.S. - Canada Agreement of April, 1972.

The Agreement, by its own terms, was designed to implement Article IV of the Boundary Waters Treaty of 1909. The Agreement covers U.S. - Canada "boundary waters," as that term is defined in the treaty; however, not all "boundary waters" are included, but only those which are within the "Great Lakes System," a term which is not defined. Articles II and III of the Agreement, and its annexes, establish general and specific water quality objectives for boundary waters. Article V provides that:

> "Programs and other measures directed toward the achievement of the water quality objectives shall be developed and implemented as soon as practicable in accordance with legislation in the two countries. Unless otherwise agreed, such programs and other measures shall be either completed or in process of implementation by December 31, 1975."

Article V goes on to specify the nature of the programs, which are to include "Programs for the abatement and control of discharges of municipal sewage into the Great Lakes System" (including treatment works construction, financial support for such construction, and monitoring, surveillance and enforcement activities), and "programs for the abatement and control of pollution from industrial sources," as well as programs directed toward eutrophication, non-point source pollution, and pollution from shipping and dredging activities and onshore/offshore facilities.

Article IV of the Agreement provides that:

> "Water quality standards and other regulatory requirements of the Parties shall be consistent with the achievement of the water quality objectives. The Parties shall use their best efforts to ensure that water quality standards and other regulatory requirements of the State and Provincial Governments shall similarly be consistent with the achievement of the water quality objectives." (emphasis added).

Article X of the Agreement states that the Parties ". . . commit themselves to seek . . . the cooperation of the State and Provincial Governments in all matters relating to this agreement." (emphasis added). Article I(j) defines the term "State Governments" to mean the governments of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

C. The FWPCA Amendments.

Section 511(a) of the Act states that the Act ". . . shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States." Section 101(c) encourages international cooperation in pollution abatement. Section 7 of the Act states:

> "The President shall undertake to enter into international agreements to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums."

Also of significance are the provisions of Section 310 of the Act, dealing with international pollution abatement. Under that section, the Administrator is empowered to investigate and initiate enforcement proceedings to abate pollution which ". . . endangers the health or welfare of persons in a foreign country . . . ."

II.

The materials discussed above clearly establish that the United States is committed to a policy of cooperation with Canada in alleviating common water pollution problems, and that the general policies contained in the FWPCA Amendments are fully consistent with the treaty and the Agreement. In that context, we now turn to a discussion of the general impact of the treaty and the Agreement on Federal-State relationships.

Article VI of the U.S. Constitution states in part that ". . . all treaties . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The Agreement, of course, is not a "treaty," since it was not the subject of concurrence by the Senate pursuant to Article II of the Constitution; nevertheless, it represents an exercise of Federal international sovereignty pursuant to, and in accordance with, both legislation and a treaty, and contrary State policy cannot prevail against it:

> "Plainly, the external powers of the United States are to be exercised without regard to State laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison . . . said that if a treaty does not supersede existing State laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the State laws, would bring on the union the just charge of national perfidy . . .' And while this rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several States . . . in respect of all international negotiations and compacts, and in respect of our foreign relations generally, State lines disappear." U.S. v. Belmont, 301 U.S. 324, 331-2 (1937).

To the same effect, see Zschernig v. Miller, 389 U.S. 429 (1968); Kolovrat v. Oregon, 366 U.S. 187 (1961); U.S. v. Pink, 315 U.S. 203 (1942); Altman & Co. v. U.S., 224 U.S. 583 (1911); and, generally, 14 Digest of International Law Sections 22-25 (Department of State Publication 8547 (September, 1970)).

Executive agreements may be legally inoperative to the extent that they conflict with an Act of Congress in an area of Congressional competence. U.S. v. Capps, Inc., 204 F.2d 655 (4th Cir., 1953). As indicated in the background discussion under I above, however, the general policies of the Agreement in no way appear inconsistent with the general policies of the FWPCA Amendments, and, although we have not examined them in detail, the water quality objectives set forth in the agreement appear to fully comport with EPA objectives under the FWPCA Amendments.

III.

The FWPCA Amendments generally leave the matter of determining priority of treatment works projects to the States. At the same time, however, the Act charges EPA with responsibilities for determining both the adequacy of each State's system of prioritization and the consistency of the system with the objectives of the Act. Section 204 of the Act provides that the Administrator may not approve a grant for any treatment works in a State unless he first determines that such works have been certified by the State as entitled to priority over other such works". . . in accordance with any applicable State plan under section 303(e) of this Act . . . ." Section 303(e) requires each State to submit to the Administrator for his approval a proposed continuing planning process, including a description of priority needs, ". . . which is consistent with this Act." (emphasis added). Under the provision of construction grant regulations governing priority certification (40 CFR 35.915), the Administrator may approve or disapprove the State priority system, the criteria used by the State in establishing relative priorities, and municipal and project lists established by the State under its system.

The problem posed by your inquiry relates to the gap, unfilled by explicit legislative language, between the strong Federal policies favoring Great Lakes Water pollution abatement and the fact that project priorities are primarily a matter for State determination. We believe that the gap may be bridged by combined reference to the policies of the Agreement and the consistent policies of the FWPCA Amendments; the Agreement's supremacy over countervailing State policies; and the responsibilities the Administrator has for determining that project prioritization in the States comports with the policies of the Act.

As we understand it, the objectives of the Agreement may largely be thwarted unless Great Lakes area treatment works projects are undertaken at an early stage. Furthermore, emphasis on Great Lakes projects would appear to be appropriate in view of the provisions of Section 310 of the Act, discussed above. We view these considerations as colateral arguments in support of an affirmative answer to your inquiry.

While we have answered your inquiry in the affirmative, we have not discussed matters relating to the precise means by which preferential priority requirements for Great Lakes projects would be implemented. This is of concern to us, and we request consultation with this office prior to development of mechanisms for implementing such requirements.

Finally, we strongly urge policy consideration of the propriety of implementing such policies. Discriminatory requirements which may prove disadvantageous to non-Great Lakes projects in a state should be a matter of considerable concern, particularly in view of the limitation on resources resulting from allotment of less than full Congressionally-authorized sums for treatment works construction.

§ § § § § § §

TITLE: Use of Revenue Sharing Funds for Waste Treatment Projects

DATE: June 25, 1973

Questions have arisen concerning the extent to which revenue sharing funds obtained by communities or states under the State and Local Fiscal Assistance Act of 1972 (PL 92-512) may be utilized for projects funded by EPA.

Generally, revenue sharing funds may not be used as matching funds under EPA grants, as is made clear in regulations issued on April 10, 1973 by the Department of Treasury (31 CFR Part 51, published at 38 F.R. 9132):

§51.30 Matching funds.

> "(a) In general. -- Entitlement funds may not be used, directly or indirectly, as a contribution in order to obtain any Federal funds under any Federal program. The indirect use of entitlement funds to match Federal funds is defined to mean the allocation of entitlement funds to a nonmatching expenditure and thereby releasing or displacing local funds which are used for the purpose of matching Federal funds. This prohibition on use of entitlement funds as matching funds applies to Federal programs where Federal funds are required to be matched by non-Federal funds and to Federal programs which allow matching from either Federal or non-Federal funds."

However, revenue sharing funds may be used to "supplement" Federal grant funds, as further set forth in §51.30(g) of the Treasury regulations:

> "(g) Use of entitlement funds to supplement Federal grant funds. The prohibition on use of entitlement funds contained in paragraph (a) of this section does not prevent the use of entitlement funds to supplement other Federal grant funds. For example, if expenditures for a project exceed the amount available from non-Federal funds plus matched Federal funds, the recipient government may use entitlement funds to defray the excess costs: Provided, however, that the entitlement funds are not used to match other Federal funds: And Provided further, that in the case of a unit of local government, the use of entitlement funds to supplement Federal grants is restricted to the category of expenditures as set forth in §51.31."

Accordingly, since "environmental protection (including sewage disposal, sanitation, and pollution abatement)" is an explicitly authorized expenditure in §51.31 of the Treasury regulations, cost overruns or sewer line or land acquisition costs not included within the scope of an EPA grant as allowable costs may be funded through any revenue sharing funds available to the EPA grantee.

In a memorandum to the Director, Grants Administration Division, dated August 21, 1972 concerning the use of other Federal grant funds to meet EPA matching requirements, Mr. Settle of this office set forth the general rule that:

> "Funds granted by other Federal agencies for projects may not, absent explicit statutory authorization, be used to meet EPA statutory grant 'matching' requirements for those same projects."

His memorandum discusses a number of other Federal statutes which do permit at least limited use of Federal funds for matching purposes. Federal revenue sharing funds available under PL 92-512 fall within the "general rule" and cannot be used to match EPA grant funds.

Enforcement of this prohibition upon the use of Federal revenue sharing funds is a function of the Department of Treasury, which should be notified of any apparent violation.

§ § § § § § §

SOLID WASTE GRANTS

TITLE: Grants To States Under Solid Waste Disposal Act, As Amended

DATE: August 23, 1971

QUESTION NO. 1

May grant funds received under the Solid Waste Disposal Act, as amended, be used for reimbursement of State revenue losses resulting from State tax deductions and exemptions allowed to businesses for expenditures on refuse separating and processing equipment?

The Solid Waste Disposal Act, as amended, provides for grants for the purpose of research, demonstrations, training and planning by organizations eligible to receive such grants pursuant to the provisions of Section 204, 205, 207, 208, and 210. Section 215(b) prohibits grants to private profit-making organizations. In our opinion, reimbursement for State revenue losses does not fall within the scope of the studies, grants and contracts authorized by the Act. Accordingly, we concur in the tentative negative response furnished to Mr. Harrington in the letter from your office dated April 29, 1971.

QUESTION NO. 2

May the Massachussetts State Science Foundation qualify as a grant recipient for research and development studies under the Solid Waste Disposal Act, as amended?

The Resource Recovery Act of 1970 (Pub. L. 91-512) substantially expanded eligibility for solid waste management grants and contracts. Specifically, for the purpose of research and development, Section 204 now authorizes grants or contracts to "appropriate public (whether Federal, State, interstate, or local) authorities, agencies, and institutions, private agencies and institutions, and individuals" for the broadly stated purposes now set forth in Section 204. Accordingly, there would appear to be no reason why the Massachussetts State Science Foundation would not be eligible to apply for solid waste management contracts or grants, in competition with other eligible organizations. However, Section 204 funds may only be distributed for specific research and development projects approved by your office for Federal funding. The Massachussetts State Science Foundation may not receive Section 204 funds unrelated to specific projects, nor may it receive Section 204 funds for distribution to educational institutions and private corporations for projects selected or approved solely by MSSF.

QUESTION NO. 3

What is the present status of the September 5, 1968 memorandum of opinion of the HEW Office of the General Counsel with respect to Solid Waste Management planning grants?

At the time that the September 5, 1968 memorandum was written Section 206 of the Solid Waste Act (Pub. L. 89-272) restricted eligibility for planning grants to the "single state agency" designated or established to carry out State-wide planning. The memorandum therefore properly held that this single State agency had to retain fiscal and program responsibility under such grants, and any subagreements with local agencies by the State Agency were to assure that planning remained State-wide in scope and that control and responsibility for planning were to remain with the "single State agency".

Since that time, however, the Resource Recovery Act of 1970 has substantially changed the provisions of the Solid Waste Disposal Act relating to planning grants, which are now authorized to be made to "State, interstate, municipal, and intermunicipal agencies, and organizations composed of public officials which are eligible for assistance under section 701(g) of the Housing Act of 1954", pursuant to Section 207 of the Solid Waste Disposal Act, as amended. Organizations eligible to receive these section 207 planning grants may enter into such subagreements as are necessary to accomplish the purposes of the grant, provided that the grantee retains control of and responsibility for the grant project and does not serve as a straw man or mere conduit. Generally, these subagreements must be embodied in written instruments, whether in the form of subgrants, contracts, purchase orders, or the like, so that the grant expenditures may be properly accounted for and audited.

§ § § § § § §

TITLE: Solid Waste Disposal Act -- Grant Support for Site Surveys

DATE: August 31, 1971

FACTS

By memorandum of July 27, 1971, this office was requested to issue an opinion respecting certain questions concerning the authority of the Solid Waste Management office to fund programs which are used to develop local and regional solid waste management plans.

QUESTION NO. 1

Are site surveys, which include such tasks as soil borings, soil analyses, geological investigations and hydrologic inventories, eligible for funding under Section 207 of the Solid Waste Disposal Act?

ANSWER

Yes. Section 204 of the Act, would authorize Federal participation in such activity.

DISCUSSION

The basic authority to participate in site surveys is found in Section 204(a)(2) and Section 204(b)(3) together with Section 204(a)(1) and (2). Section 204(a) authorizes the Administrator to cooperate with and render financial assistance to appropriate public authorities in the conduct of and coordination of "research, investigations, . . . surveys and studies relating to (2) the operation and financing of solid waste disposal programs." In order to carry out the investigations and surveys outlined above, Section (b)(3) authorizes the Administrator to make grants for research . . . surveys and demonstrations . . . ." With specific regard to planning grants, Section 207(a)(1) of the Act authorizes the Administrator to issue grants for "making surveys of solid waste disposal practices and problems within the jurisdictional areas" of the agencies to which the grants are made. Under Section 207(a)(2) the Administrator is to make grants for "developing and revising solid waste disposal plans as part of regional environmental protection systems for such areas. . . . and studies of the effect and relationship of solid waste disposal practices on areas adjacent to waste disposal sites." This authority to issue grants for survey and plan purposes, and to study the effect and the relationship of solid waste disposal practices on areas near disposal sites would seem to include such tasks as soil borings, soil analyses, geological investigations and hydrologic inventories on different sites within the jurisdiction of the grantee and therefore such activity would be eligible for planning grant assistance under the Act.

QUESTION NO. 2

If site surveys are eligible for participation for Federal funding, is there any limitation on the detail specificity or scope of the work eligible for such funding?

ANSWER

Yes. Under the above outlined sections of the Solid Waste Disposal Act eligible costs would be somewhat limited.

DISCUSSION

Eligible costs would be limited to the survey and study of disposal practices on areas adjacent to proposed waste disposal sites; such study would necessarily include analyses such as hydrological inventories, geological surveys and other necessary technical evaluation sufficient to determine the impact of solid waste disposal on any given site under consideration for a disposal site. Moreover, Section 207 (a)(1) would confine the area of study to the jurisdictional limit of the grantee agency.

$ $ $ $ $ $ $

AIR GRANTS

TITLE: Use of Local Funds on Air Pollution Control Program Grants

DATE: January 29, 1973

FACTS

In your letter of December 11, 1972, you inquired whether the City of Chicago, Department of Environmental Control, could lawfully use local funds which were non-matchable for purposes of earning a grant for program improvement, but which were nonetheless required to be spent in order to obtain such a grant, for the purpose of matching a grant for program maintenance under Section 105 of the Clean Air Act 42 USC (1857(a)(1)(A).

Chicago spent $993,989 for air pollution control programs during 1967 which amount became the grantee's PEP (Program Exclusive of Project) base for 1968. To obtain a grant for improvement in 1968, Chicago was required to spend at least as much in 1967, and this amount was ineligible for matching the 1968 phase of the multi-year improvement project. As a condition to receiving the 1968 improvement grant of $393,000, the grantee was thus required to spend $196,500 in addition to its PEP base expenditures.

On July 1, 1968, Chicago received a grant of $479,200 for the maintenance of its air pollution control program, as authorized by the Clean Air Act Amendments of 1966, P.L. 89-675. The grantee's PEP base expenditures were used as part of its 50% matching share for the maintenance grant. A similar arrangement was permitted during 1969 and 1970.

A bar graph is attached which illustrates the maintenance and improvement grants made to Chicago during 1968, 1969, and 1970 and Chicago's unaudited reports of expenditures during those years.

QUESTION

Does any legal objection exist to a grantee's use of its PEP base expenditures for the purpose of matching a maintenance grant, where such expenditures were required as a condition to receiving an improvement grant but which could not be used for matching an improvement grant?

ANSWER

No; such matching was lawful, inasmuch as the regulations then in effect were consistent with law and did not forbid the practice.

Section 104 (now 105) of the Clean Air Act, as amended by P.L. 89-675 in 1966, stated:

> (a) The Secretary is authorized to make grants to air pollution control agencies in an amount up to two-thirds of the cost of developing, establishing, or improving, and grants to such agencies in an amount up to one-half of the cost of maintaining, programs for the prevention and control of air pollution. . . (b) From the sums available for the purpose of subsection (a) of this section for any fiscal year, the Secretary shall from time to time make grants to air pollution control agencies upon such terms and conditions as the Secretary may find necessary to carry out the purpose of this section. In establishing regulations for the granting of such funds the Secretary shall, so far as practicable, give due consideration to (1) the population, (2) the extent of the actual or potential air pollution problem, and (3) the financial need of the respective agencies. No agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds, for other than non-recurrent expenditures, for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year; and no agency shall receive any grant under this section with respect to the maintenance of a program for the prevention and control of air pollution unless the Secretary is satisfied that such grant will be so used as to supplement and, to the extent practicable, increase the level of State, local, and other non-Federal funds that would in the absence of such grant be made available for the maintenance of such program, and will in no event supplant such State, local, and other non-Federal funds...

Section 104 may be summarized as follows: (1) no agency may receive an improvement grant or a maintenance grant unless its local expenditures (exclusive of non-recurring costs) will be at least as great as those of the preceding fiscal year, and (2) no maintenance grant may be made unless the grant will be used to supplement, not supplant, the local funds which would otherwise be available for air pollution control programs.

The statute thus authorizes two distinct types of grants to assist local air pollution control agencies. The older "improvement" grant authority provides for a federal grant of up to two-thirds of the cost of developing, establishing, or improving such programs, and the authority added by P.L. 89-675 provides for a federal grant of up to one-half the cost of maintaining such programs.

Although current regulations, 40 CFR 35.507-2, provide that no federal grant at the two-thirds level will be available once an initial premaintenance program has expired, the regulations in effect at the time the grants in question were made contained no such restriction. Both regulatory approaches seem consistent with the 1966 Amendments, since Congress evidently intended that the maintenance grant authority supplement existing authority for improvement grants, so that local agencies would not become ineligible for federal assistance when their programs reached maturity. A similar intention seems to underlie the provision that non-recurring expenditures were not to be considered part of the grantee's required base expenditures. Thus, a program may be "established" with two-thirds federal funding, then "maintained" at one-half federal funding; and a separate though simultaneous "improvement" project at two-thirds federal funding is also permissible. Whether a particular grant was to be for "improvement" or for "maintenance" thus appears to have been a matter for administrative determination in accordance with the criteria of 42 CFR, Part 56, then in effect. (See Conference Report, H.R. No. 1003, 89th Cong., 2d Sess., p. 4; House Report No. 2170, 89th Cong., 2d Sess., p. 4; and cong. Record, July 12, 1966, p. 5258.)

The regulations applicable to the grants in question are found in 42 CFR, Part 56, as amended by 32 F.R. 104, May 20, 1067. The PEP requirement was established by §56.4(3), which provided:

> No grant for project support (note--defined in §56.2(d) as an improvement grant) shall be made to any applicant during any fiscal year unless the Surgeon General finds that the applicant's expenditures of non-Federal funds (for other than nonrecurrent expenditures) for its air pollution program (exclusive of its expenditures for the approved project) will not be less during such fiscal year immediately preceding the beginning of the project with respect to which a grant is requested.

That the regulations contemplated contemporaneous receipt by a single grantee of both a maintenance grant and an improvement grant is indicated by §56.4(i)(2), which stated:

> The term "non-recurrent expenditures" means expenditures for the following purposes: (vi) Funds utilized for matching purposes for improvement projects under section 104 (note--now section 105) of the Act as part of a program for which maintenance support is also provided.

A multi-year project for improvement was thus established, and the grantee was obligated to spend not less than the PEP base as a condition of receiving each annual award under the project. While neither a maintenance grant nor an improvement grant could be made unless the applicant's expenditure of non-Federal funds would not be less than its expenditures of the previous year, there was no requirement that the grantee spend any amount "exclusive of the project" as a condition of receiving a maintenance grant. The PEP concept applied exclusively to projects for improvement because such projects were considered to be separate from the existing program. Nothing in the regulations forbade the grantee to use the PEP funds generated under previous phases of a multi-year improvement project for the purpose of matching grants for program maintenance, inasmuch as §56.4(i)(2), supra, applied only to funds actually used to match a particular grant rather than to PEP funds. The PEP base expenditures were thus not matching funds, but were an independent condition of receiving the improvement grant for which additional matching funds were necessary.

In summary, we have not found any statute, regulation, or special grant condition which forbade the grantee to sue its PEP base expenditures to match grants for program maintenance.

§ § § § § § §

TITLE: Consolidation of Air Program Grants Within a State

DATE: February 21, 1973

FACTS

Section 105 of the Clean Air Act, as amended (42 U.S.C. 1857c), authorizes the award of grants for support of air pollution planning and control programs to state air pollution control agencies and to local agencies. In order to maximize the similarity of and coordination between local programs and the state program, and for administrative convenience, Region VIII desires to consolidate EPA assistance for a state agency and local agencies within that state into one grant to the state agency in selected states within Region VIII.

QUESTION:

May program grants for a state air pollution control agency and local agencies within that state be consolidated into a single grant to the state agency for all air pollution control agencies within a state?

ANSWER:

Yes, subject to the considerations discussed below.

DISCUSSION:

The proposed grant, which would consolidate air program grants within a state into a single grant, would be analogous to the "comprehensive grant" authorized under 40 CFR 30.205 and shares many of its advantages, but would not require the Administrator's approval otherwise required for comprehensive grants (unless accomplished within the context of a comprehensive grant to a state), because it would lie clearly within the grant award authority of the Regional Administrator under present law and regulations.

Existing regulations (40 CFR 35.400 et seq., 37 F.R. 11655, June 9, 1972) authorize, but do not require, grants to air pollution control agencies within a state. The Regional Administrator may determine to fund all or some of the local agencies within a state through the mechanism of the state program grant. Such a consolidation is particularly appropriate where state legislation requires that the state agency exercise responsibility for the local programs or the local agencies agree to permit the state agency to exercise such responsibility to the extent implicit in the budgetary and program control of the consolidated grant mechanism. It is apparent that effective utilization of a consolidated single grant is dependent upon the voluntary cooperation and consent of the local agencies within the state.

As we understand the proposed award, a written subagreement would be executed between the state agency and each local agency, pursuant to which Federal grant funds would be made available to each local agency through the state agency in accordance with the terms of the consolidated grant agreement. Article 11 of Appendix A in 40 CFR part 30 requires that subagreements be approved by EPA; such review and approval should insure that appropriate EPA program requirements "flow down" through the state agency to the local agencies. Article 11 provides that such a subagreement "may not be in the nature of a grant." In our view, the consolidation mechanism would not violate this prohibition, since the agreement with each local agency would be contractual in nature (insofar as it would effect accomplishment locally of the state agency's air pollution control responsibility as defined in the grant agreement between EPA and the state agency), and also because the local agency is an entity otherwise eligible to receive a direct grant under Section 105.

A key matter of concern should be the requirements of the statute and present regulations concerning the "matching" and "maintenance of effort" aspects of air program grants. Expenditures by the state agency must meet the maintenance of effort requirement in Section 105(b). Under present regulations the state agency must also continue to meet the "matching" requirement set forth in 40 CFR 35.507-2 and 35.507-3; contributions of local agencies may be included within the state matching share in the same manner as direct state appropriations for the state program. As a matter of policy, it would be appropriate to insure the contributions by the local agencies are generally the same as the matching requirements which would otherwise apply if separate direct grants were awarded.

In summary, this office favors experimentation with the proposed grant consolidation, which appears to offer a number of possibilities for enhancing the effectiveness of the air pollution control effort within a state. Experience with the consolidated air program grant mechanism may justify revision of present regulations to require funding of state and local air programs upon such a basis.

In our opinion, award of the proposed consolidated air program grant lies within the Regional Administrator's award authority under existing regulations; no deviation request (40 CFR 30.1001) is required. The extent to which the provisions of the subagreements between the state agency and the local agencies should reflect provisions which would otherwise be required under present regulations if a separate grant were awarded to each local agency is a policy matter within the discretion of the Regional Administrator.

§ § § § § § §

GRANTS: OTHER

TITLE: Legal Review of EPA Contracts and Grants

Contracts and grants generated by the respective EPA offices in the Washington Metropolitan area are legal instruments which should be subject to legal review.[1] Accordingly, it is our opinion that (1) EPA policy should be that all procurements negotiated or advertised, amounting to upwards of $10,000 and grants in amount upwards to $50,000 should be legally reviewed to the maximum extent consistent with the availability of lawyers assigned to the Office of the Assistant General Counsel, Grants and Procurement (OGC-GP). (2) Procurements and grants exceeding $100,000 or having a significant impact on EPA programs or policies, should in all instances, be legally re viewed by OGC-GP. (3) Legal counsel from OGC-GP should participate fully in the entire procurement process from the stage of advance procurement planning to contract completion or termination and close out. (4) Legal counsel from OGC-GP should serve on Boards of awards and review and concur in all written determinations and findings relating to contracts and grant modifications in amounts of $10,000 or more.

Construction grants or grants or contracts made out of EPA regional offices should, in accordance with the terms set forth above, be reviewed by EPA regional counsel.

The implementation of the above review will provide a uniform, positive legal overlook by the Office of General Counsel with respect to all EPA procurement and grants and should be effectuated no later than October 1, 1971.

---

[1] APP 1-451(c) Any contract is essentially a legal document and, as such, every action leading to the award of a contract, contract performance, and completion or termination of a contract inherently involves legal considerations. While the contracting officer is the exclusive agent of the Government for entering into and administering contracts and is responsible for coordinating his team of advisors, he is not completely free to evaluate the legal advice of his legal counsel and act in a manner inconsistent therewith. The contracting officer cannot properly make an award of a contract which fails to meet all legal requirements. If a proposed course of action is determined by procurement legal counsel to be legally insufficient, the contracting officer shall take steps to overcome the legal objections to the proposed action. Failing such resolution at purchasing office level, the contracting officer shall refer the matter to the cognizant Head of Procuring Activity for resolution.

§ § § § § § §

TITLE: Use of Other Federal Grant Funds to Meet EPA Matching Requirements

DATE: August 21, 1972

FACTS:

Questions have arisen concerning the extent to which grantees under EPA programs may, in order to comply with statutory matching requirements of such programs, use funds received under other Federal grant programs. Recently, we received from your office the specific inquiry whether funds granted pursuant to the New Communities Act of 1968 (42 U.S.C. 3901 et seq.,) may be used by a granted to meet the 25% matching requirement of Section 208(b)(2) of the Solid Waste Disposal Act of 1965, as amended (42 U.S.C. 3245(b)(2)).

QUESTION:

To what extent may other Federal grant funds, including funds granted pursuant to the New Communitites Act of 1968, be used by EPA grantees to meet statutory matching requirements?

ANSWER:

Funds granted by other Federal agencies for projects may not, absent explicit statutory authorization, be used to meet EPA statutory grant "matching" requirements for those same projects. Since no such authorizing language is contained in the New Communities Act of 1968, nor in legislation pertaining to the programs for which the Act authorizes supplementary grants, funds granted by the Department of Housing and Urban Development (HUD) pursuant to the Act may not be used to meet the matching requirements of EPA programs, including the solid waste resource recovery program. However, authorization for such use of non-EPA funds is contained in other statutory grant programs.

DISCUSSION:

Our memorandum to you dated August 2, 1972, concluded that funds under HUD's "Model Cities" program could be used by a grantee to meet the matching requirements of EPA's solid waste resource recovery program, because such use is explicitly authorized by Section 105 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3305(d)). Absent such explicit statutory authorization, opinions of the Comptroller General indicate that other Federal grant funds may not be so used for matching.

In 47 Comp. Gen. 81 (July 28, 1967) the Comptroller General disapproved use for the same project of Federal grant funds from one agency to match grant funds available from another agency under legislation providing that "the grantee agrees to pay the remaining cost." In the view of the Comptroller General, the latter requirement presented the agency with a duty to require the grantee to pay costs in excess of grant amounts. The agency has a vested right, which could not be waived, to require grantees to complete assisted projects without further costs to the Government. In a related context, the Comptroller General has also held that to permit grantees to use Federal grant funds under one program to match funds under another program would permit a grantee to obtain funds under two federal grant programs on a basis more favorable than that intended by Congress. 32 Comp. Gen. 140 (September 25, 1952).

Statutory language pertaining to matching funds varies from program to program; however, these opinions of the Comptroller General require the conclusion that explicit statutory authority is needed for use of one Federal agency's grant funds for matching another agency's grants. Such authority will generally be found in the non-EPA program legislation, for it is under that legislation that the funds to be used for matching are appropriated. Although EPA grant program legislation must permit use of such funds for matching purposes, the typical silence of EPA legislation must be taken as authorization, since otherwise the explicit authorization in the non-EPA legislation would be frustrated.

Against the foregoing background, it may be seen that New Communities program grants may not be used to meet EPA matching requirements. That program, administered by HUD, is primarily concerned with bond guarantees for localities involved in community land development. In addition, however, 42 U.S.C. 3911 authorizes the Secretary, HUD, to make grants to State and local agencies carrying out "new community assistance projects" (defined as projects assisted by grants under 7 U.S.C. 1926(a)(2), 42 U.S.C. 1500-1500e, or 42 U.S.C. 3102) to the extent the Secretary determines such grants are necessary for carrying out a development project given assistance, generally in the form of bond guarantees, under the New Communities Act. Thus, grants authorized by the New Communities Act are designed to supplement certain other grants. Stated another way, any project for which grant funds are sought under 42 U.S.C. 3911 must, as a condition to receiving such grants, already be in receipt of grant funds under one or more of the three other programs denominated above. Briefly stated, those three programs are as follows:

-7 U.S.C. 1926(a)(2) (Section 306(a)(2) of the Consolidated Farmers Home Administration Act of 1961, as amended), authorizes the Secretary of Agriculture to make grants to finance projects for water storage or treatment works, and for waste collection and treatment, in rural areas.

-42 U.S.C. 3102 (Section 702 of the Housing and Urban Development Act of 1965, as amended) authorizes the Secretary, HUD, to make grants to finance projects for basic public water and sewer works (other than "treatment works" as defined in the Federal Water Pollution Control Act).

-42 U.S.C. 1500-1500e (Sections 701-10 of the Open Space Land Act of 1961, as amended), authorize a variety of grants designed to aid acquisition and development of urban parks, and historic preservations.

Neither the New Communities Act, nor the three grant programs supplemented by that Act, explicity authorize use of grant funds for matching purposes under their Federal grant programs. The four programs are silent on the issue; thus, the negative impact of the cited Comptroller General Decisions cannot be avoided.

Although New Communities Act funds may not be used for matching EPA grants, there are a number of other Federal grant programs under which funds can be so used. As a frame of reference for discussion of such programs, we briefly mention the apparent bases of non-Federal matching requirements and the exceptions.

Besides reduction of Federal costs and increased distribution of available funds, an obvious purpose of matching requirements is to require the grantee to have a substantial financial interest in the assisted project, thus assuring concern for program objectives and for efficiency and economy. Some grantees, however, may not have the capacity to participate financially in a given project to the extent required by matching provisions, although there may exist a definite need for the benefits of the project. In certain programs, Congress has dealt with this situation by including authorization which, in effect, allows substitution of Federal grant funds for local funds to meet matching requirement of other Federal matching programs.

Typical of such authorization is that found in the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 et seq.,) which has as its purpose, as stated in 42 U.S.C. 3121, the assistance of areas of substantial and persistant unemployment in planning and financing public works and economic development. The program is administered by the Secretary of Commerce. 42 U.S.C. 3131(a)(2) authorizes supplementary grants so that States and localities within redevelopment areas may take maximum advantage of other Federal grant programs ". . .for which they are eligible but for which, because of their economic situation, they cannot supply the required matching share."

Under the Emergency Employment Act of 1971, 42 U.S.C. 4871 et seq., the Secretary of Labor is authorized to make financial assistance available to government entities to provide employment ". . .during times of high unemployment" in jobs providing needed public services. The Act permits use of granted funds for matching purposes under other Federal programs, provided that , as stated in 42 U.S.C 4881(a)(1)(C), the funds will not ". . . result in the substitution of Federal for other funds in connection with work that would otherwise be performed. . . ." Thus, if a grantee has its own funds available for matching an EPA grant, funds under the Emergency Employment Act may not be substituted for them. However, if the grantee has no funds for matching, or if its funds are so limited as to be practically unavailable for matching in light of other priority needs, then the EPA project could not "otherwise be performed," and it would appear that grant funds would be available for matching under the Act.

The Appalachian Regional Development Act of 1965, as amended (40 U.S.C. App. 101 et seq.,), administered by the Secretary of Health, Education, and Welfare, is designed to aid economic and other development of the depressed Appalachian region. 40 U.S.C. App. 202(c) authorizes the use of funds granted for demonstration health projects under the Act for matching purposes ". . .to increase Federal grants for operating components of a demonstration health project. . . ." Further, 40 U.S.C. App. 214 authorizes grants to supplement other Federal grant programs for the ". . .acquisition of land or the construction or equipment of facilities. . .", in order to enable grantees in the region to take maximum advantage of such grant programs for

> ". . .which they are eligible but for which, because of their economic situation, they cannot supply the required matching share, or for which there are insufficient funds available under the Federal grant-in-aid act authorizing such programs to meet pressing needs of the region. . . ."

In addition, and as previously discussed in our memorandum of August 2, 1972, explicit authority for use of HUD "Model Cities" grant funds for matching purposes is contained in the legislation establishing that program.

Please note that we have not conducted an exhaustive review of all Federal grant programs with respect to this issue. This office or Regional Counsel should be consulted with regard to other programs under which questions of matching authority arise. Consultation with Regional Counsel is also appropriate in regard to the various conditions attending the programs discussed, as such conditions are not detailed herein.

Finally, we wish to point out that the cost sharing provision contained in EPA-GR 30.207, which generally requires the grantee to contribute no less than 5% of project costs, is an administrative requirement which may be waived by EPA pursuant to the deviation provisions of EPA-GR 30.1001. This requirement is automatically met in the case of EPA grant programs which have a statutory matching requirement of more than 5%.

§ § § § § § §

CONTRACTS

TITLE: Authority to Contract for Paid Advertising

DATE: May 11, 1971

In your memorandum of April 12, 1971, you requested advice concerning the delegation of the authority contained in 44 U.S.C. §3702 (former 44 U.S.C. §324) to contract for paid advertising, pursuant to 5 U.S.C. §302(b).

RECOMMENDATION:

This office concurs in the recommendation that the Administrator make specific written delegations of authority directly to those personnel who are operationally required to contract for paid advertising.

DISCUSSION:

FPR §1-2.203-3(b) requires that:

> * * *Paid advertisments in newspapers and trade journals shall be contracted for in accordance with agency procedures pursuant to 5 U.S.C. 22a [now 5 U.S.C. 302]; 44 U.S.C. 321, 322, and 324 [now 44 U.S.C. 3701, 3702, and 3703]; and Title 7, Chapter 5200, General Accounting Policy and Procedures Manual for Guidance of Federal Agencies.

The GAO provision referred to, which is currently found in Title 7, Chapter 5, Section 25.2 of the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies, states:

> * * *Delegated authority to authorize advertising may not be redelegated unless otherwise authorized by law. The delegation of authority, as well as all invoices and bills, should be made available to the General Accounting Office for audit purposes [Emphasis added.]

This prohibition against redelegation is reflected in the procurement regulations of the Department of Transportation; see 41 CFR 12-2.203-3(b).

Accordingly, it is the opinion of this office that a direct and explicit delegation of authority in writing to each person who is operationally charged with responsibility to contract for advertising is required. Any such delegation should be made pursuant to the two minimum requirements: (1) the authorization must be in writing, as required by the statute (44 U.S.C. 3702); and (2) there must be no redelegation, pursuant to GAO policy.

It should be noted that it may become necessary to change or make additional such authorizations in the future. While promulgation of the proposed draft EPA Order or an amendment to EPA Order 1110.16 would clearly satisfy the statutory and GAO requirements, we suggest that these authorizations by letter authorization to each of the persons who require such authorization. These letter authorizations could be perfected by an EPA Order at a later date.

§ § § § § § §

TITLE: Proposed Contracts for Obtaining an Advertising Campaign

DATE: June 30, 1972

FACTS:

Your letter dated June 26, 1972, request our opinion concerning the authority for executing proposed contract 68-01-0550 and another similar contract. Under the contract (which is a basic ordering agreement) individual tasks orders would be issued for the performance of various phases of the creation of an advertising campaign, which would culminate in the delivery to EPA of several "spot" commercials for placement by EPA on televisions (hopefully on a no-cost basis), and perhaps of other types of advertisements for insertion by EPA in other media.

QUESTION:

What legal restrictions pertain to such a contract?

ANSWER:

The obtaining of such services by contract is not per se illegal. However, there are statutes which restrict to a degree the purpose and therefore the content of Agency advertisments.

DISCUSSION:

Section 102 of the National Environmental Policy Act, read in conjunction with the various statutes administered by EPA, allows the dissemination of information concerning pollution and the need for its abatement and control. There are limitations upon the freedom of any agency to advertise its mission and its accomplishments, however.

18 U.S.C 1913 makes it a crime, punishable by $500 fine or one year's imprisonment, or both, and removal from office, for an agency employee to use appropriated funds

> directly or indirectly to pay for any personal service, advertisment, . . .or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote, or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation. . . . . [Emphasis added.]

This statute has not been very productive of interpretation, and its precise meaning is accordingly not as clear as would be desirable. It appears from a common-sense reading of it, however, that an advertising campaign is barred by 18 U.S.C. 1913 from advocating greater Congressional emphasis on pollution control, and from advocating such things as letter-writing campaigns to Federal legislators. Naturally, it would be grossly improper to refer to the need for passing particular environmental legislation.

The other statute which appears to have direct application is 5 U.S.C. 3107 and old (vintage 1913) law which states:

> Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.

While this statute seems sweeping, there is a considerable history of experience by Federal agencies operating under the statute and a number of Congressional remarks concerning the statute (and similar restrictions applying to one specific agency or another) which lead this office to conclude that a strict reading of the statute is unjustified. See generally Rosapepa, "Neither Pinkertons nor Publicity Men," an article appearing in the October, 1971, Public Relations Journal at page 12, suggesting that the statute is more a reflection of particular Congressmen's feelings regarding the publicizing of certain programs than a general ban on public affairs activities.

In 31 Comp. Gen. 311, (1952), a decision interpreting a Labor Department appropriation which prohibited use of appropriated funds for "publicity or propaganda purposes," the Comptroller General stated:

> [I]n the legislative history of other statutory provisions limiting, rather than prohibiting, the expenditure of sums for publicity purposes, it is indicated that the intent is to prevent publicity of a nature tending to emphasize the importance of the agency in question.

The decision goes on to quote Senator Byrd (Congressional Record, June 19, 1951, page 6890)" on a bill he authorized:

> Individual glorification of bureaucrats and political propaganda constitute the press service problem which this amendment seeks to curtail. It has been a problem for a long time. Since 1913, as I said, there has been a statute on the books providing that no money appropriated by Congress shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose.

Senator Byrd's bill was designed to reduce by 25% of the budget request the amount available to pay "employees whose functions are those of publicity experts and their assistants, and those engaged in related supporting activities. . . ."

In the cited Comptroller General decision, it was held that it was legal to make expenditures for "those functions of your Division of Information which deal with dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws the duty for the enforcement of which falls upon your Board."

It would appear that 5 U.S.C. 3107 is a "rule of reason," which will be cited by the Comptroller General and by Congress if this Agency's activities in the dissemination of information go past education and constitute either glorification of the Agency or its individual employees, or advocacy of the approaches taken by Agency program elements.

President Nixon's November 6, 1970, memorandum to the heads of Executive Departments and Agencies, Subject: Public Relations Activities, which you are already aware of, states the President's desire to "put an end to inappropriate promotional activities by executive branch agencies." The memorandum directed OMB to make cuts in agencies' public relations budgets, and stated:

> I want to make it clear that this is not an attempt to single out those who serve the Government well by informing the public and preserving the principle of freedom of information. Rather, it is directed to those who are, quite understandably, program advocates, and who, perhaps unknowingly, affront many of our citizens with public relations promotions, fancy publications and exhibits aimed at a limited audience, and similar extravagances that are not in keeping with this Administration's often stated policy of frugal management of the public's resources.

While this memorandum is not "law" in the sense of a statute, it is a clear indication of Presidential purpose. We do not know whether the prescribed budget cuts were the sole remedy prescribed for the problem noted by the President. The Office of Public Affairs has earlier informed us that EPA was in compliance with applicable White House directives. (See Causey, "The Federal Diary" column, Washington Post, page B9, March 13, 1972, that OMB action in the area has been completed and that the "Nixon administration is preparing to declare victory in the President's war on 'self-serving' publicity seeking of federal agencies.")

A good measure of restraint is thus called for on the part of those Office of Public Affairs employees who will be charged with selection and approval of advertising strategies and tactics. While it is not illegal to advertise in furtherance of the agency's mission, unpleasantness of various kinds can result from an abuse of the agency's discretion.

In an earlier, short note on the subject, we suggested review of each task order in light of controlling law. We feel that responsibility for such review with respect to the statutes and Executive policy must be placed squarely on the Project Officer.

While we concede that the guidance this memo offers is not in black-and-white, it is the best we can offer in this little-explored field. We feel that this memo should be passed on to the Project Officer and the contractors with a cautionary note explaining the power of GAO to disallow contractual payments for advertising held to violate either of the mentioned statutes.

§ § § § § § §

TITLE: Contracts for Dissemination of Information or Encouragement of Citizen Action

DATE: January 18, 1972

QUESTION:

Is there legal objection to the award by EPA of contracts for the dissemination of information to public-service groups or to the general public, and/or contracts for the encouragement of citizen action in areas of environmental concern?

ANSWER:

The extent to which EPA may contract for the types of services mentioned above is primarily a matter of policy determination within the parameters set forth in the discussion below. In this context, we have no general legal objection to award of such contracts.

DISCUSSION:

In determining whether contracts for the dissemination of information or for the encouragement of citizen action may be awarded by EPA, a primary issue is whether EPA is authorized to engage in the kinds of activities which the contracts are designed to accomplish. EPA has not been specifically directed or authorized to inform the general public of pollution problems, nor to encourage the activities of public-service groups interested in improving the environment.

However, the National Environmental Policy Act of 1969 (NEPA) furnishes the statutory direction to EPA as well as other executive agencies to furnish information and to render financial and technical assistance to further the Federal policies set forth in NEPA. In Section 101(a) of NEPA, Congress

> declares that it is the continuing policy of the Federal Government. . . to use all practical means and measure, including financial and technical assistance, in a manner calculated to . . . create and maintain conditions under which man and nature can exist in productive harmony.

Section 102(f) directs all Federal agencies, including EPA, to:

> make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.

And Section 105 of NEPA states in part that:

> the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

The Environmental Education Act, Public Law 91-516 (October 30, 1970), 20 U.S.C. §§1532 et seq., authorized the Office of Education, HEW, to award grants and contracts to organizations for purposes similar or identical to those for which the EPA Office of Public Affairs proposes to award contracts. After study of the Act and its legislative history, we conclude that Congress has not assigned to the Office of Education the sole responsibility for environmental education to the exclusion of other Federal executive agencies. In this context, see for example, 20 U.S.C. §1533, directing the Secretary of HEW to render technical assistance to other agencies, including Federal agencies, to ". . .enable the recipient agency to carry on education programs which are related to environmental quality and ecological balance." Consequently, we are of the opinion the the Environmental Education Act complements NEPA rather than overrides it.

Having found authority available for EPA to disseminate information to the public and to encourage citizen involvement, we are of the opinion that EPA may contract with others to accomplish such functions. See 31 U.S.C. §686(a), 21 Comp. Gen. 400 (1941), subject to the availability of an appropriation and to the various laws and regulations applicable generally to public contracts.

It is our understanding that the appropriation to be charged with the cost of the various contracts in question is the FY 1972 appropriation "for necessary expenses of the Environmental Protection Agency," Public law 92-73 (August 10, 1971), 85 Stat. 194, and in particular that portion of the "Program Direction and Support" allotment made available by EPA to the Office of Public Affairs. Consequently, once it has been administratively determined that the programs in question are "necessary expenses" of EPA, there is no legal objection to the advancement of the program by contract. In so concluding, we have noted the following colloquy in the hearings before the House Appropriations Committee subcommittee during which the Administrator explained the EPA budget:

> Mr. ANDREWS: We need this individual participation whether it is students in the summer or individuals in their own homes and shops and backyards. What arrangements are being made to disperse information to the average citizen regarding environmental problems and their solutions?
>
> Mr. RUCKELSHAUS: Through our Public Affairs Office, we are attempting to bring together a community action program which is aimed at not only the dispersal of information about the environment but also methods of getting communities involved in solving their own problems. . . .to the extent that we can tell that kind of a story around the country and convince other communities that with the right kind of initiative and leadership they can do the same thing [as was done at Lake Washington, Seattle, Washington], I think that we can achieve a great deal at rather minimal cost to the Federal Government.

Mr. ANDREWS: Isn't that one of the better ways of meeting the challenge?

Mr. RUCKELSHAUS: I think it is the best way.....

Hearings on Agricultural-Environmental and Consumer Protection Appropriations for 1972 Before a Subcommittee of the House Committee on Appropriations, 92nd Cong., 1st Sess., Pt. 5, at 393-4 (1971).

EPA Order 1110.23, September 9, 1971, delegated to the Office of Public Affairs and its Public Services Division the authority to conduct community relations, public participation and environmental education programs.

It should be observed that many of the projects for which your office has proposed support are of the type more readily financed by grant than by contract. However, as you know, EPA possesses no statutory authority to award grants for support of such projects. We reiterate our suggestion that your office press for legislation authorizing such grants. We recommend strongly that such legislation not be sought first for one pollution category and then another, since we feel that the inevitable result will be differing grant criteria, matching ratios, and so on, which will require the administratively cumbersome "tagging" of projects. We suggest that the Environmental Eduction Act functions now lodged in the Office of Education should be transferred to EPA; if this is not feasible, however, EPA should at least obtain parallel authority.

The statutory restrictions on grant award found in the Environmental Education Act are, we feel, wisely drawn. Moreover, we believe that HEW's policy of public solicitation of request for support under that Act merits attention. By "opening" up the program and allowing interested groups of all persuasions to submit proposals, the HEW policy tends to mute criticism from Congress, GAO or the public which might be voiced where the supported projects limited to "in-house" ideas or to proposals from groups who learned only by happenstance of fund availability. This would be in keeping with the statutory directive that all Government contracts shall be awarded after completion to the extent practicable.

§ § § § § § §

TITLE: Patent Rights Clause (What Rights are Retained by Government and its Contracted Company in the Course a Proposed EPA Contract with the Company

DATE: June 28, 1973

ISSUE:

What rights shall be retained by the Government and Cushing Engineering, Inc. (hereafter referred to as Cushing) respectively, in inventions made in the course of or under a proposed EPA contract with Cushing. The purpose of the contract is to develop, design, fabricate, test, evaluate and deliver an electromagnetic flowmeter that will indicate volumetric flowrate of liquids in partially filled conduits.

DISCUSSION:

Functions of Cushing and Objectives of Contract

The proposed contract is based on an unsolicited proposal submitted by Cushing, and assigned EPA REP No. CI-73-0087. The proposal sets forth a concept, and theory of operation, of an electromagnetic, volumetric flowmeter having sensing electrodes placed in pairs around the inside periphery of a conduit, and provided with appropriate electronic circuitry, all working together so as to produce an accurate readout of volumetric flowrate even though the conduit might be only partially full. The system proposed by Cushing is alleged to be proprietary to Cushing.

The concept, as disclosed in the proposal, has not yet been actually reduced to practice, and it is an objective of the contract to bring about an actual reduction to practice. However, Cushing, and more particularly Vincent J. Cushing, president and principal investigator, have previously designed, constructed and sold electromagnetic flowmeters capable of measuring volumetric flowrate in pressurized, full pipelines. These devices are, however, not suitable for use in partially full pipelines; it is therefore a purpose of the contract to extend the capabilities of present electromagnetic flowmeter technology to such partially full pipelines, and most particularly to storm and/or combined sewers.

There has been a long felt need for a flowmeter capable of accurate, and obstructionless measurement of volumetric flowrate in open channels and partially full pipelines. The need is becoming greater, in view of an increasing need for automated sewer flow control systems; of which a device like Cushings could be a key element.

The estimated cost of the contract, which will be totally funded by EPA, is $102,000. However, Cushing avers that in addition to funds previously received under related Government R&D contracts, it has expended about $850,000 of private funds in connection with research and commercialization of related metering devices.

Invention Rights -- Request by Cushing

Cushing has formally requested that it be permitted to retain more than a mere nonexclusive license in any invention made in the course of or under the proposed contract, on the grounds of the presence of "exceptional circumstances" of the sort contemplated by Section 1(a) of the President's Statement of Government Patent Policy of August 23, 1971, (Tab A).

Cushing's main concern is to avoid a disposition of rights, i.e., a government retention of all rights, which would permit government use and licensing on a scale such that it could result in substantial dimunition or even complete destruction of Cushing's present commercial position in the field of electromagnetic flowmeters suitable for flowrate measurement in full conduits.

The exceptional circumstances averred by Cushing include the aforementioned expenditure by it of about $850,000 in closely related fields, as compared with the proposed EPA expenditure of about $102,000. Cushing also emphasizes that it is a small company, dependent largely on its present and contemplated commercial position in electromagnatic flowmeters for pressurized flowrate measurement, and similar current meters, and the allegation that unrestricted government licensing of any related contract developed inventions might destroy its present business by unjustifiably acting to establish overwhelming competition as a result of a relatively minimal government contribution to the field of electromagnetic flowmeters. On the other hand, and as an alleged exceptional circumstance, Cushing is willing to permit unrestricted, royalty-free use of both foreground and background inventions in the field of obstructionless flowrate measurement in less than full water and wastewater pipelines.

In addition, Cushing avers that it has much greater than average competence in the field of electromagnetic flow measurement, as evidenced by a fairly extensive patent position, and the commercial sucess of certain of its products.

It should also be noted that Cushing has indicated that it is so concerned about protection of its present and future commercial positions, that it woul probably not contract with EPA if the Government takes title to foregroun inventions.

Views of EPA Personnel

Responsible EPA personnel, and others, are firmly of the opinion that there is a great need for a volumetric flowrate meter capable of accurate measurement in less than full pipelines. There is no lack of satisfactory devices for measurement in full or pressurized pipelines.

Such personnel also feel that Cushing, and most particularly Dr. Cushing himself, have established, by past efforts and results, a much higher than average capability in the field of electromagnetic flowmetering, and that such a metering technique has higher than average possibilities for producing a meter of the type needed. They also are of the opinion, as are outside EPA reviewers of Cushing's proposal, that there is a considerably better than average chance that the allegedly proprietary approach suggested by Cushing will result in a meter satisfing the aforementioned needs. It should be noted that if the concept suggested by Cushing is actually reduced to practice under the contract, both the Government and the public would acquire certain rights thereto.

Said EPA scientific personnel feel that leaving rights to Cushing in the field of pressurized or full pipeline flowrate measurement is warranted, in view of the aforementioned factors.

ALTERNATIVES:

Option A: Incorporate a standard EPA patent rights clause in the proposed contract with Cushing.

pro: 1. Would permit the Government to obtain all rights to inventions arising under the proposed contract, subject to only a nonexclusive license to Cushing.

con: 1. This option would provide no recognition of Cushing's past expenditure of about $850,000, which exceeds the $102,000 of Government funds to be furnished under the contract, nor would it recognize Cushing's unique expertise.

2. Cushing not likely to contract, since it feels that if Government takes all rights, its proprietary position in existing inventions and know-how may be jeopardized.

Option B: Incorporate a patent rights clause in the contract with Cushing that permits it to retain rights greater than a nonexclusive license in all future inventions made under the contract.

pro: 1. Provides equitable recognition for Cushing's past expenditures in fields closely related to the proposed contract, and its unique, relevant expertise.

2. Minimizes risk to Cushing's existing patent and business position thereby encouraging its participation in the proposed project.

3. May prove to be incentive for more quickly making foreground inventions commercially available to public, than if Government owns all rights.

4. Provides, substantial public and Government rights to foreground invention, and for royalty-free licensing of background patents owned by Cushing for use of foreground and background in areas of special interest to EPA.

con: 1. This option does not provide either the Government or the public a completely unrestricted right to use inventions made under the proposed project.

DISCUSSION OF THE ALTERNATIVES:

The proposed project and contract relevant thereto are deemed subject to Section 1(a) of the President's Statement of Government Patent Policy of August 23, 1971, (Tab A), and pursuant thereto the Government, normally, should either obtain, or reserve the right to obtain, principal rights to inventions made in the course of or under the proposed contract.

However, Section 1(a) of the President's Statement goes on to state that even under a 1(a) situation, in exceptional circumstances it can be agreed at the time of contracting to leave a contractor rights greater than a nonexclusive license if the "head of the agency," certifies, at the time of contracting, that it is in the best interest of the public to do so.

The responsible EPA scientific personnel and the Office of General Counsel have considered the information made available by Cushing, and have concluded that there are "exceptional circumstances" of the sort probably contemplated by the President's Statement, present in the instant situation, and that pursuance of above Option B is warranted.

Relevant, additional background information and exceptional circumstances are listed in the attached Certificate of Public Interest (Tab B).

Patent Right Clause -- Option B

Under the recommended clause (Tab C), the contractor retains all rights, title and interest in any invention made in the course of or under the contract.

However, the rights of the contractor are subject to a paid-up, nonexclusive license in the Government, with the right to grant sublicenses, said license and any sublicenses must however, be limited to practice of any such invention in the combination field of (1) obstructionless volumetric measurement of water and wastewater and (2) such measurement must be made, in the case of pipelines, at a point where the pipe is normally less than full. This covers those areas of primary concern of EPA.

In addition, the clause provides for royalty-free licensing of contractor's background patents for practice thereof in conjunction with all or part of the meter delivered and/or designed under the contract, limited, however, to use of the meter under the same two conditions as set forth in the immediately preceding paragraph.

Insofar as those invention rights left to the Contractor are concerned, there are certain "match-in" provisions intended to encourage timely development and marketing of inventions subject to such rights. There are also provisions designed to assure availability of such an invention to satisfy public health, welfare or safety needs.

The clause also provides for consideration by the Administrator of a contractor request for waiver of certain of the Government's rights back to the contractor, after an invention has been reported. The decision regarding such a request is solely in the hands of the Administrator or his designee.

The enclosed Certificate and Patent Rights clause have been reviewed by the Office of General Counsel, EPA, and found by that office to be in compliance with all relevant laws and regulations and in compliance with the guidelines of the President's Statement of Government Patent Policy of August 23, 1971.

RECOMMENDATION:

It is recommended that the attached Patent Rights clause (Tab C) be used in the proposed contract with Cushing. To implement use of said clause, it is recommended that you sign the attached Certificate of Public Interest.

DISPOSITION:

The proposed contract with Cushing will incorporate both the original of the attached Certificate of Public Interest and a copy of the Patent Rights clause.

SECTION VII OPINIONS AFFECTING THE GENERAL ADMINISTRATION OF EPA

AGENCY MANAGEMENT AND PERSONNEL

REIMBURSEMENT OF PERSONNEL TRAVEL EXPENSES

TITLE: Reimbursement of Travel Expenses from Non-Federal Sources

You recently raised a question concerning the legality of the attendance at an international conference of an EPA employee, where travel, lodging and subsistence were provided by the non-Federal sponsor of the conference.

In general, acceptance by a federal agency of such support from non-federal sources constitutes an improper augmentation of its appropriation, 46 Comp. Gen. 689 (1967). While some agencies such as HEW, have specific statutory authority to except gifts "in cash or in kind" from any non-federal source, EPA does not.

However, a limited exception to the stringency of the Comptroller General's position is available to EPA. Under 5 U.S.C. §4111, Congress authorized the President to promulgate regulations according to which federal employees might accept "payment of travel, subsistence and other expenses incident to attendance at meetings" from an organization exempt from taxation under §501(c)(3) of the Internal Revenue Code. (Generally speaking, such organizations are those which may receive tax-deductible contributions). The President's authority under 5 U.S.C. §4111 has been delegated to the Civil Service Commission, by virtue of §401(b) of Executive Order No. 11348 (1967). The pertinent CSC regulations are set forth in Part 410 of Title 5, Code of Federal Regulations.

Under 5 CFR §410.702, the head of an agency, or his designated representative, may authorize acceptance by an agency employee of payment in cash or in kind for travel, subsistence and other expenses incident to attendance at meetings, when such payment comes from an organization exempt under §501(c)(3), as long as no possible conflict of interest appears.

Accordingly, the Administrator presently has the authority to authorize such payments. I intend to propose the delegation of that authority to the Counselor designated in EPA's Conflict of Interest Regulations, 40 CFR Part 3.

I recognize that 5 U.S.C. §4111 speaks only of "payment" of certain expenses incident to attendance at a meeting, and does not refer specifically to acceptance of food, lodging, etc. where no money changes hands. It is my opinion, however, that that omission is not significant, in view of the common sense statutory interpretation implicitly adopted by CSC in 5 CFR §410.702.

I also realize that the foregoing discussion is of no help to you in connection with a meeting sponsored by the World Health Organization: as an organ of the United Nations, WHO is exempt from income taxation by virtue of §892 of the Internal Revenue Code, rather than §501(c)(3). Accordingly, 5 U.S.C. §4111 is inapplicable; although this result seems absurd, the status is plain. In such cases, it seems that the best practice is to place the employee involved on Administrative leave. Technically, then, his attendance at the meeting will not lead to an impermissible augmentation of EPA's appropriation. I am advised that this practice is traditionally used by other federal agencies and goes unquestioned by the General Accounting Office. I would think, however, that the convenient procedure under 5 U.S.C. §4111 and regulations thereunder would be available in many, if not most, of the cases in which the problem arises.

§ § § § § § §

TITLE: Legality of International Organizations or Foreign Countries Paying EPA Employee's Expenses

DATE: August 10, 1972

You recently requested this office's opinion on the subject of the legality of certain international organizations paying the travel and subsistence expenses of EPA employees invited to attend or speak at conferences, etc., sponsored by such organizations. An earlier memorandum from the Office of General Counsel had advised that 3 U.S.C. 4111 allows this practice only for organizations which are tax exempt under 26 U.S.C. 501(c)(3).

QUESTION:

May an international organization legally reimburse an EPA employee who incurs travel and/or subsistence expenses at the request of such an international organization?

ANSWER:

Yes, either directly by payment to the employee, or indirectly through reimbursement of EPA by the international organization of EPA payment of normal travel-subsistence pay to the employee, resulting in no net cost to either EPA or the employee. The statutory provisions discussed below must be complied with.

DISCUSSION:

This office was not aware, at the time of our January 7, 1972, memorandum on the subject, of the existence of 5 U.S.C. 3343, which provides:

> (a) For the purpose of this section--
>
> (1) "agency", "employee", and "international organization" have the meanings given them by section 3581 of this title; and

(2) "detail" means the assignment or loan of an employee to an international organization without a change of position from the agency by which he is employed to an international organization.

(b) The head of an agency may detail, for a period of not more than 5 years, an employee of his agency to an international organization which requests services, except that under special circumstances, where the President determines it to be in the national interest, he may extend the 5-year period for up to an additional 3 years.

(c) An employee detailed under subsection (b) of this section is deemed, for the purpose of preserving his allowances, privileges, rights, seniority, and other benefits, an employee of the agency from which detailed, and he is entiled to pay, allowances, and benefits from funds available to that agency. The authorization and payment of these allowances and other benefits from appropriations available therefore is deemed to comply with section 5536 of this title.

(d) Details may be made under subsection (b) of this section--

(1) Without reimbursement to the United States by the international organization; or

(2) With agreement by the international organization to reimburse the United States for all or part of the pay, travel expenses, and allowances payable during the detail, and the reimbursement shall be credited to the appropriation, fund, or account used for paying the amounts reimbursed.

(e) An employee detailed under subsection (b) of this section may be paid or reimbursed by an international organization for allowances or expenses incurred in the performance of duties required by the detail, without regard to section 209 of title 18.

5 U.S.C. 3581 defines "agency" as, *inter alia*, "an Executive agency;" states that "employee" means "an employee in or under an agency;" and provides that "international organization" means " a public international organization or international organization preparatory commission in which the Government of the United States participates." 5 U.S.C. 3584 authorizes the President to promulgate regulations necessary to carry out 5 U.S.C. 3343. Executive Order No. 11552, August 24, 1970, 35 Federal Register 13569. In turn redelegates most of the Presidential power to the Civil Service Commission. We have found no regulation which affects your particular question.

Note that only public international organizations, in which the United States participates as a government, are covered by 5 U.S.C. 3343. Note also that there must be a request by the international organization to EPA, followed by a detail of the employee to the organization (there is no minimum duration prescribed for a detail). If the indirect route of payment of employee expenses is to be used (that is, with the money flowing through EPA), there must be an agreement between EPA and the organization, (in any case, to avoid later controversy, the mode of payment should be agreed to in advance.) If an employee is paid directly to the requesting organization, he should not also expect to receive reimbursement of the same outlays from EPA.

Finally, although 5 U.S.C. 3343 speaks of details being made by "the head of an agency," U.S.C. 302 authorizes the agency head to redelegate "to subordinate officials the authority vested in him . . . by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency . . . ." Accordingly, we would suggest that your Office obtain a delegation from the Administration to detail employees to international organizations for limited periods of time (the appropriate Assistant Administrator or Regional Administrator should concur in the detail).

To the extent that this memorandum does not differ with our January 7, 1972 memorandum on this subject, the earlier memorandum remains in effect. Thus, private international organizations not qualified for tax exemption under 26 U.S.C. 501(c)(3) may not pay the expenses of EPA employees unless the employee is in an unpaid (leave) status at the time he renders services to the organization.

§ § § § § § §

TITLE: Payment of EPA Employees' Travel Expenses
by the Federal Republic of Germany

DATE: September 27, 1973

QUESTION

You have asked whether the Regional Administrator of Region X may lawfully accept transportation, food, and lodging from the Federal Republic of Germany pursuant to an invitation from the West German Government to visit persons and points of interest in the West German environmental protection community.

ANSWER

Yes; although U.S. employees may not accept travel and per diem payments from foreign governments, a foreign government may provide transportation, food, and lodging in kind to a U.S. employee traveling on official business, for which an appropriate adjustment will be made in the travel and per diem allowance paid by the U.S. Government. In the alternative, the West German Government may reimburse the United States for the U.S. employee's travel and per diem and such reimbursement will be deposited in the Treasury as miscellaneous receipts. Acceptance of personal gifts is governed by 22 CFR, Part 3.

DISCUSSION

Article I, Section 9, of the Constitution of the United States provides in pertinent part:

No title of mobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

The Comptroller General has ruled that this constitutional provision forbids any federal employee to accept directly any payment of travel and per diem, from a foreign government. Foreign governments may, however, reimburse the U.S. Government for the travel and per diem expenses of U.S. employees traveling on official business and such reimbursement must be paid over to the Treasury as miscellaneous receipts. (See 18 CG 460, Nov. 17, 1938).

With respect to personal gifts from foreign governments, however, Congress has consented to U.S. employees' acceptance of such gifts where the gift is either of minimal value or refusal to accept the gift would be likely to cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. Regulations of the Department of State which implement this Congressional consent are found in 22 CFR, Part 3.

We note that the State Department regulations allow U.S. employees rather broad discretion in the acceptance of foreign gifts. For example, although an employee may not request or otherwise encourage the tender of a gift, employees are authorized to accept and retain "gifts of minimal value"; i.e., items which have a retail value not in excess of $50 in the United States. With respect to "gifts of more than minimal value" the regulations state that the employee should advise the donor that acceptance of such gifts is contrary to U.S. policy, but that if refusal would cause embarrassment, etc., such gifts may be accepted and turned over to the State Department's Chief of Protocol for disposal.

Although the State Department regulations authorize agencies to impose more stringent standards of conduct with respect to their own employees, EPA regulations seem to incorporate those of the State Department, inasmuch as Section 101(e)(2) of EPA's regulations states:

> An employee shall not accept a gift, present, decoration or other thing from a foreign government unless authorized by Congress as provided by the Constitution and Section 7342 of Title 5, United States Code.

EPA may, of course, administratively establish a more restrictive policy.

Although employees may accept certain gifts under the State Department regulations, Congress has not authorized U.S. employees to accept travel and per diem from foreign governments, and the Comptroller General's ruling in 18 CG 460, above, is thus still in effect. Foreign governments, however, frequently provide transportation, food, and lodging in kind to

U.S. employees traveling on official government business. This practice is unobjectionable so long as the U.S. Government makes an appropriate reduction in travel and per diem payments to the employee, since such provision in kind is considered a government-to-government courtesy rather than a personal donation to the U.S. employee and apparently does not violate any constitutional provision, statute, or regulation. (See 21 CG 1055, 33 CG 183, and 43 CG 675).

West Germany may, of course, prefer an arrangement whereby the U.S. employee receives travel and per diem from the United States in the usual manner, whereupon the Federal Republic would reimburse the United States Treasury.

Either method of bearing the expense of a U.S. employee's visit to a foreign country is permissible. The sole prohibitions are: (1) under the Comptroller General's ruling, travel and per diem payments may not be made directly to the employee; (2) the employee's travel and per diem payments must be reduced if transportation, food, or lodging is provided in kind by the foreign government; and (3) the employee is subject to the provisions of 22 CFR, Part 3.

§ § § § § § §

TITLE: Visitors' Release and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities

DATE: November 8, 1972

FACTS

As a condition to entry on industrial facilities, certain firms have required EPA employees to sign agreements which purport to release the company from tort liability. The following "Visitors Release" required by the Owens-Corning Fiberglas Corporation is an example:

> VISITORS RELEASE
>
> In consideration of permission to enter the premises of Owens-Corning Fiberglas Corporation and being aware of the risk of injury from equipment, negligence of employees or of other visitors, and from other causes the undersigned assumes all risk, releases said corporation, and agrees to hold it harmless from liability for any injury to him or his property while upon its premises. . .
>
> READ CAREFULLY BEFORE SIGNING

In addition to such "Visitors Releases" employees or their supervisors have been asked to sign entry permits which include an agreement that EPA will pay for any injury or damage resulting from our activities at the facility.

QUESTIONS

1. Does signing such a "Visitors Release" effectively waive the employee's right to obtain damages for tortious injury?

2. May EPA employees contractually obligate the Agency to pay for any injury or damage caused by our activities?

3. May firms condition EPA's entry upon signing such agreements?

ANSWERS

1. Generally, yes; employees waive their right to damages and the government is prevented from exercising its right of subrogation under the Federal Employees' Compensation Act.

2. No; federal tort liability is established and limited by the Federal Tort Claims Act, and such agreements are also invalid as violative of the Anti-Deficiency Act.

3. No; EPA employees possess a right of entry under both the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972.

DISCUSSION

Although the precise effect of an advance release of liability for negligence cannot be determined without reference to the law of the state in which the tort occurs, we must assume that such agreements are generally valid. By signing such agreements EPA employees may effectively waive their right to sue for damages and the government's right of subrogation under the Federal Employees' Compensation Act, 5 USC 8101 et seq.

The Restatement of Contracts, Ch. 18, § 575 states:

> (1) A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if
>
> (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or,
>
> (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation . . .

With the exceptions mentioned in the Restatement of Contracts, supra, no general public policy seems to exist against express agreements for assumption of risk, and they need not be supported by consideration. 10 Prosser on Torts § 55 and Restatement of Torts 2d, Ch. 17A, §496B. Despite this general rule, cases arising under the Federal Tort Claims Act involving releases signed by civilian passengers prior to boarding ill-fated government aircraft indicate that the courts do not favor such agreements. (*Friedman v. Lockheed Aircraft Corp.*, 138 F. Supp. 530 (1956)--a release is no defense against gross, willful, or wanton negligence in New York; *Rogow v. U.S.*, 173 F. Supp. 547 (1959)-a release is ineffective unless the flight is gratuitous; *Montellier v. U. S.*, 315 F2d 180 (1963)--a release does not destroy a cause of action for wrongful death in Massachussetts). Such apparent judicial disfavor of advance releases is, of course, insufficient justification for assuming the risk of signing them, and ordinary prudence requires us to assume their validity. Although signing a release does not affect the employee's right to benefits under FECA, such compensation will ordinarily be much less than might be recovered in a tort action against the negligent corporation.

Since the Federal Employees' Compensation Act, 5 USC 8131 and 8132, provides that an employee may be required to assign his right to sue third parties to the United States and that the employee must, within limitations, pay over any recovery from third parties as reimbursement of FECA benefits, the employee's release prejudices the government's rights as well as his own. Employees should therefore be instructed not to sign such releases under any circumstances.

Although an EPA employee's express assumption of the risk of injury to himself may be valid, an agreement which purports to obligate EPA to pay all damages caused by our activities is not. The Federal Tort Claims Act, 28 USC 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages . . .

Congress has granted only a limited waiver of the government's sovereign immunity, and 28 USC 2680 lists exceptions to the general waiver stated in 28 USC 2674, *supra*. Exceptions which might be relevant in cases arising out of the actions of EPA employees include 28 USC 2680(a):

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused;

and 28 USC 2680(b):

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .

Since the government's tort liability is limited by statute, an administrative undertaking to expand such liability by contract is probably invalid. In any event, EPA should not create the occasion for judicial resolution of the question.

An additional basis for considering such indemnification agreements invalid is the Anti-Deficiency Act, which provides at 31 USC 665(a):

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein . . .

Since the extent of the government's obligation is uncertain, the Comptroller General has stated that a contractual assumption of tort liability is not a lawful obligation of the United States, and payment may not be made pursuant to such agreement. (7 CG 507, 15 CG 803, and 35 CG 86). In fairness to companies which may rely upon the validity of such indemnity provisions, employees should be instructed not to sign them.

Inasmuch as the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972 grant EPA employees a right of entry to corporate facilities, a company may not lawfully condition the exercise of this right upon the signing of a release or indemnity agreement. The Clean Air Act provides, at 42 USC 1857c--9(a)(2):

> . . . the Administrator or his authorized representative, upon presentation of his credentials---(A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located. . .

The procedure for enforcement of this right is provided in 42 USC 1857c--8:

> (a)(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of . . . any requirement of section 1857c--9 of this title, he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section. (b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person--(4) fails or refuses to comply with any requirement of section 1857c--9 of this title.

When a firm refuses entry to an EPA employee performing his functions under the Clean Air Act, the employee may appropriately cite the statute and remind the company of EPA's right to seek judicial enforcement. If the company persists in its refusal, EPA should go to court in preference to signing a "Visitors Release".

In addition to procedure for judicial enforcement similar to that of the Clean Air Act, the Federal Water Pollution Control Act Amendments of 1972 reinforce EPA's right of entry with criminal and civil penalties. Section 309 states:

> (c)(1) Any person who willfully or negligency violates section. . . 308 of this Act (Note--Section 308 establishes the right of entry) . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both. (3) For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer. (d) Any person who violates section . . . 308 of this Act. . . and any person who violates any order issued by the Administrator under subsection (a) of this section (Note--subsection (a) provides for administrative orders to enforce the right of entry), shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

In See v Seattle, 387 U.S. 541 (1967) the Supreme Court reversed the conviction of a corporation for refusal to admit building inspectors of the City of Seattle. Justice White held that the Fourth and Fourteenth Amendments required a warrant for such inspections, even where the search was reasonably related to protecting the public health and safety and even where a corporation, rather than an individual, was the subject. Under See evidence obtained by inspectors of the Food and Drug Administration has been held inadmissible where the inspectors obtained consent to enter by threatening prosecution under 21 USC 331, which provides criminal penalties for refusal to permit entry, U.S. v. Kramer Grocery Co., 418 F2d 987 (8th Cir., 1969). Although two more recent Supreme Court decisions, Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) and U.S. v. Biswell, 92 S. Ct. 1593 (1972), may create doubt as to whether See retains its original vigor (see Memorandum of the Assistant to the Deputy General Counsel, September 29, 1972), the possibility that evidence obtained under the FWPCA Amendments of 1972 will be ruled inadmissible is a risk EPA need not assume.

Since the Amendments provide for judicial enforcement of the right of entry, EPA employees should be instructed not to mention the civil or criminal penalties of Section 309 when faced with a refusal to permit entry. When such refusals occur, this office should be informed immediately so that a decision can be made as to whether to issue an order of the Administrator under 309(a) or seek an appropriate judical remedy under 309(b).

§ § § § § § §

TITLE: EPA Utilization of Foreign Scientists

DATE: March 22, 1973

Pursuant to your recent request, this office has conducted a search of statutes and regulations concerning employment of aliens by the U.S. Government. The results of our research are as follows:

QUESTION 1

May EPA appoint an alien to the competitive service?

ANSWER

Probably not; regulations of the Civil Service Commission provide that Commission approval must be obtained for each appointment, and approval is apparently granted only in rare cases. This prohibition does not apply, however, to persons recruited overseas and appointed to overseas positions.

DISCUSSION

Civil Service Regulations, 5 CFR 338.101, Citizenship, state:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States. (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

Unless a statute specifically authorizes appointment of aliens in the competitive service, an agency is thus forbidden to make such appointments without CSC approval, which apparently will be granted only rarely. We are not aware of any statutory provision applicable to EPA which specifically authorizes or forbids such appointments.

Moreover the Civil Service Commission cannot authorize appointment in the competitive service if an appropriation act applicable to EPA forbids payment of compensation to the General Provisions, Section 602 of P.L. 92-351, of the appropriation act for the Treasury Department, etc. applies to EPA and states (See 1972 Cong. and Adm. News 2777.)

> Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States)

> whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence: Provided, that for the purpose of this section, an affidavit signed by any such person shall be considered prima facia evidence that the requirements of this section with respect to his status have been compiled with; Provided further, that any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisonment for not more than one year, or both: Provided further, that the above penal clause shall be in addition to, and not in substitution for, any other provisions of existing law: Provided further, that any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Phillipines or to nationals of those countries allied with the United States in the current defense effort,* or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

We suggest that the State Department be consulted prior to the appointment of a national of any of the above countries whose status might have changed since 1970.

Note that although the appropriation act restrictions do not apply to persons whose post of duty is outside the continental United States, the Civil Service Commission regulations provide at 5 CFR 8.3:

> Persons who are not citizens of the United States may be recruited overseas and appointed to overseas positions without regard to the Civil Service Act:

---

* As of April 20, 1970, Volume 9 of the State Department's Foreign Affairs Manual, Chapter 3.3 listed the following countries as being associated with the United States in mutual defense activities:

Argentina
Austrailia
Belgium
Bolivia
Brazil
Chile
China (Nationalist)
Columbia
Costa Rica
Denmark
Dominion Republic
Equador
El Salvador
France
Germany (Fed. Repub.
Greece
Haiti
Honduras
Iceland
Iran
Italy
Japan
Korea (South)
Luxemburg
Mexico
Netherlands
New Zealand
Norway
Pakistan
Panama
Paraguay
Peru
Phillippines
Portugal
Spain
Thailand
Turkey
United Kingdom
Uraguay
Venezuela

The Commission's defintion of "overseas" is narrower than the encaption in the appropriation act applicable to persons whose post of duty is outside the continental United States. 5 CFR 210.102, Definition states:

> (b) In this chapter:
>
> (9) "overseas" means outside the continental United States, but does not include Alaska, Guam, Hawaii, the Isthmus of Panama, Puerto Rico, or the Virgin Islands.

Aliens are thus ineligible for appointment in the competitive service unless (1) they are excepted from appropriation act restrictions (P.L. 92-351), and (2) the Commission approves the appointment, or (3) they are recruited and appointed overseas within the definition of 5 CFR 210.102(b)(9).

QUESTION 2

May EPA appoint aliens to the excepted service (temporary or intermittent experts or consultants, etc.)?

ANSWER

Yes; provided that the appropriation act, P.L. 92-351, does not forbid EPA to compensate the alien whose services are desired.

DISCUSSION

Civil Service Regulations do not prohibit employment of aliens in the excepted service, and Chapter 300, Subchapter 11, of the Federal Personnel Manual states:

> 11-1. Employment in Excepted Positions
> a. In general there are not citizenship requirements for positions in the excepted service. However, an agency may, if it wishes, administratively restrict consideration to United States citizens. The employment of a noncitizen is subject to any applicable statutory restrictions on the expenditure of funds.

We are not aware of any EPA regulation or order forbidding employment of aliens. (For a definition of "excepted service" see 5 CFR 213.3101).

EPA may thus appoint an alien to the excepted service provided that the alien is not subject to the restrictions of P.L. 92-351, above. The State Department should be consulted, however, concerning the alien's being granted a proper visa for employment in the United States (see 22 CFR 41.12 and 22 CFR 41.24). The fact that EPA is authorized to participate in the Exchange-Visitor Program under 22 USC 2452 should facilitate this process in some cases (see letter of Paul A. Cook, Director, Facilitative Services Staff, Bureau of Education and Cultural Affairs, Department of State, to Fitzhugh Green, Associate Administrator for International Activities, December 17, 1971).

Despite appropriation act restrictions on the appointment of certain foreign nationals, the Public Health Service Act, 42 USC 241, may authorize EPA to appoint such persons to the excepted service in certain circumstances even though they are not citizens of nations associated with the United States in current defense activities. The Act provides:

> The Surgeon General shall conduct in the service, and encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, and promote the coordination of, research, investigation, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man, including water purification, sewage treatment, and pollution of lakes and streams. In carrying out the foregoing, the Surgeon General is authorized to--. . . (c) Establish and maintain research fellowships in the service with such stipends and allowances, including traveling and subsistence expenses, as he may deem necessary to procure the assistance of the most brillant and promising research fellows from the United States and abroad; . . .
> (e) Secure from time to time and for such periods as he deems advisable, the assistance and advice of experts, scholars, and consultants from the United States or abroad;

To the extent that the above activities were administered through the Environmental Health Service of the Department of Health, Education, and Welfare prior to the creation of EPA, such activities and their concomitant legal authority were transferred to EPA by Reorganization Plan No. 3 of 1970, 35 F.R. 15623 (1970). (Note: While EPA may possess this authority, we believe that sufficient question exists to warrant seeking approval of GAO before such employment is undertaken).

QUESTION 3

May persons ineligible to receive compensation because of appropriation act restrictions nontheless receive travel and per diem?

ANSWER

Yes, persons requested to travel for the government may be reimbursed for the expenses of such travel under 5 USC 5703(c).

DISCUSSION

5 USC-5703(c) states:

> A person serving without pay or at $1 a year may be allowed transportation expenses under this subchapter and a per diem allowance under this section while en route and at his place of service or employment away from his home or regular place of business. Unless a higher rate is named in an appropriation or other statute, the per diem allowance may not exceed--

(1) the rate of $25 for travel inside the continental United States, and

(2) the rates established under Section 5702(a) of this title for travel outside the continental United States.

In addition to the rates authorized by 5 USC 5703(c), travelers may be reimbursed for actual and necessary expenses, not to exceed $40 per day under certain circumstances (see OMB circular A-7, October 6, 1971, and Chapter 11, EPA Travel Manual, TR 2570.1, July 8, 1971).

Such reimbursement of travel and per diem expenses does not appear to be "compensation," as the word is used in the appropriation act, inasmuch as decisions of the OMB indicate that the person receiving such reimbursement need not be an appointed government employee, but need only be called by proper authority to travel on government business. (See 10 CG 302, 19 CG 284, 27 CG 183, and 31OG 272).

QUESTION 4

May aliens be employed by EPA contractors and grantees?

ANSWER

Yes; the statutory and administrative restrictions apply only to persons appointed by EPA, and do not restrict employment of aliens by contractors providing supplies or non-personal services and by grantees (see 19 CG 284 and 28 CG 298). (Note; Unless the alien has received the proper visa, it is, of course, unlawful for him to obtain employment in the United States).

§ § § § § § §

TITLE: Voluntary Services for EPA

DATE: August 30, 1973

FACTS

Your July 7 memorandum to the Deputy General Counsel was referred to this office for reply. You state that questions have arisen concerning the authority of EPA to accept voluntary services in situations such as the following:

1. Students, high school or college, assisting in monitoring, laboratory and other EPA work.

2. Concerned citizens assisting as needed, e.g., citizen comittees collecting samples and members of the League of Women voters performing typing and office work, etc.

3. Interested fly fishermen assisting in sample collection.

4. A retired chemist assisting in chemical analysis.

5. Retired government employees assisting in laboratory duties, including maintenance of equipment and delicate analytical instruments.

31 USC 665(b) states:

No officer or employee of the United States shall accept voluntary services for the United States or employ personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

This subsection is part of the Anti-Deficiency Act, the major portion of which is directed against the incurrence of obligations in advance of appropriations by Congress and apportionment by OMB. Nonetheless, the penalty provisions of the Anti-Deficiency Act are equally applicable to the prohibition against acceptance of voluntary services. 31 USC 665(i) provides:

> (1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any office or employee of the United States who shall knowingly and willfully violate subsection (a), (b), or (h) of this section shall, upon conviction, be fined not more than $5000 or imprisoned for not more than two years, or both.

QUESTION

In the absence of scientific statutory authority for acceptance of voluntary services, may individuals such as those listed be allowed to perform services for EPA without appointment or compensation?

ANSWER

Yes, provided that such individuals agree in advance to service without compensation. Because some question exists as to the Civil Service Commission's policy, however, such services should probably be accepted only under circumstances where the environmental acts authorize EPA to cooperate with institutions, organizations, and individuals.

DISCUSSION

The phrase "to accept voluntary service" is susceptible of two meanings. In the popular sense a voluntary service is one performed without legal or other compulsion and without expectation of payment. In the contractual sense, however, the phrase "voluntary service" is a term of art denoting a service performed without a prior agreement, with expectation of payment by persons who are often judicially castigated as "officious intermeddlers" or "mere volunteers" whom "equity will not aid." Such volunteers are entitled to payment, unless the services were rendered in an emergency or under circumstances where the beneficiary's acceptance implies a promise to pay. (See Restatement of Contracts § 72 and Restatement of Restitution § 112 and 113). If a beneficiary knowingly accepts such services a promise to pay is implied.

The legislative history of 31 USC 665(b) and subsequent interpretations by the Attorney General and the Comptroller General indicate that Congress intended the term "voluntary service" to be interpreted in its quasi-contractual rather than its popular sense. The statute is thus an anti-claims device forbidding government employees to accept services without a prior arrangement for compensation or lack thereof, so as to confer upon the donor a quasi-constractual or moral right to compensation. But the statute is not violated when an individual or organization is allowed to perform services gratuitously provided the donor disavows any claim for compensation or other benefits in advance. A gratuitous service is not a "voluntary" service in the quasi-contractual sense.

The prohibition against acceptance of voluntary services first appears in the Emergency Deficiency Appropriation Act of 1884, 23 Stat. 17. The Indian Office has exhausted its appropriation and requested Congress to appropriate $2100 to pay the salaries of persons temporarily employed between January 1 and July 1, 1884. Congress appropriated the money, but the appropriation act contained the words: ". . . and hereafter no Department or officer of the United States shall accept voluntary service in excess of that authorized by law except in cases of sudden emergency involving the lost of human life or the destruction of property." The reference to "sudden emergencies" was added by a conference committee after the Senate disagreed with the original House bill which unqualifiedly forbade acceptance of voluntary service. Mr. Randall, a manager on the part of the House, recommended passage of the bill as amended, explaining that the prohibition originated because of the practice of clerks demanding additional compensation for overtime services, and the sponsors felt that such claims should not be allowed in the future. Nonetheless, occasions might arise where the life-saving stations of the United States might need to use "volunteers" who would presumably have a just claim for compensation. (See 67 Congressional Record, Vol. 15, Pt. 4, P. 3411).

The only occasion for judicial construction of the original statute was Glavey v U.S., 35 Ct. Cl. 242 (1900), reversed on other grounds 21 S. Ct. 891, in which the issue was whether a government official possessed authority to accept Glavey's waiver of a statutorily established salary for his services as a steamboat inspector. The court held that the waiver was ineffective since Congress had required payment of salary but that, incidentally, the prohibition of voluntary services applied only to the Indian Office.

In 1905, Congress restated the prohibition as part of the Anti-Deficiency Act, 33 Stat. 1257, and changed the "emergency" language to its present form. No part of the legislative history indicates that Congress intended the statute as a measure to prevent augmentation of appropriations by acceptance of gratuitous services. The committee reports and floor debate deal exclusively with the Anti-Deficiency Act as a prohibition against obligations in excess of appropriations. The fact that the "voluntary services" language was included in the Anti-Deficiency Act lends support, however, to the view that Congress included the language solely as a device to control expenditures.

The Court of Claims has interpreted the statute as forbidding payment for services rendered in the absence of or prior to an agreement for compensation . (See Lee v. U.S., 45 Ct. Cl. 57 (1910).

In 1913 the Attorney General was asked whether the prohibition against acceptance of voluntary services forbade employment of a retired Army officer as superintendent of an Indian school without any compensation in addition to his retired pay. The Attorney General opened that such services could lawfully be accepted, and offered the following discussion in his opinion:

> . . . [I]t seems plain that the words "voluntary service" were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning, these words refer to services intruded by a private person as a "volunteer" and not rendered pursuant to any prior contract or obligation . . .
>
> Taking the section as a whole, it is also perfectly evident from its legislative history that the purpose was to prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress. In its original form it did not contain the words I have italicized above (concerning voluntary services), but merely prohibited--
>
>> (1) Any present expenditures in excess of appropriations.
>>
>> (2) Any contract for future payments in excess of the appropriation. Experience convinced Congress that these provisions did not suffice to accomplish the full result desired, because deficiencies continued to occur and claims for extra services or for unauthorized services continued to be presented in such a way as to put Congress under a moral compulsion to meet them. Accordingly, Congress added to Revised Statutes, section 3679, the words italicized above, which involved the prohibition of "obligations" as well as "contracts" and prohibited, in addition to the above matters (1) and (2) therefore specified by the section, the following further matters:
>>
>> (3) Acceptance of voluntary service (i.e., service which though not performed under the prohibited contract or obligation, still carried with it a quasi-contractual or moral right to compensation)...

> Thus it is evident that the evil at which Congress was aiming was appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. The latter class of case has been held to be within the act. (Lee v. United States, 45 Ct. Cl. 57).
>
> Having regard, therefore, to the particular language used and to the purpose disclosed also by the legislative history, I am of the opinion that Revised Statutes, section 3679, does not prohibit the appointment of a person to an official position even though it to be a condition of the appointment that the service is to be without compensation.
>
> Of course, I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation . . . (citing Glavey v. U.S.). (30 Ops, Atty. Gen. 129 (1913)).

The Comptroller General has often disallowed payments for services rendered in the absence of a prior agreement for compensation or held that persons may perform services gratuitously if any for compensation was waived in advance. (See 7 CG 810; 9 CG 255; 10 CG 248; 13 CG 103; 13 CG 108; 14 CG 355; 17 CG 530; 18 CG 424; 20 CG 267; 23 CG 272; 24 CG 314; and 24 CG 900 at 902. The Administrator of Veterans Affairs had used federal employees after hours as nurses' aids at $1 per year. The Comptroller General opined that payment of the $1 violated the rule against dual compensation, 5 USC 58, but that use of such persons as nurses' aides without any compensation did not violate 31 USC 665(b). The Comptroller General stated:

> There has been considerable misunderstanding regarding the proper application of that statutory provision (31 USC 665(b)--the practice having been adopted, it seems, of authorizing the payment of salary at the rate of $1 per annum in order to prevent a violation of said statute. Such a practice is unnecessary unless some other statute or appropriation act requires the payment of $1 per annum. In that connection see the decision of June 26, 1928, 7 Comp. Gen. 810, 811, wherein it was stated: "The voluntary service referred to in said statute is not necessarily synonymous with gratuitous service, but, contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefore. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section."

Several recent Comptroller General decisions, however, contain language to the effect that 31 USC 665(b) was intended to forbid augmentation of appropriations, thus preventing federal agencies from using gratuitous services to engage in activities beyond those made possible by Congressional appropriations. (See 42 CG 651 (1963) and B-173933, Sept. 10, 1971). In 42 CG 651 the Smithsonian Institution, which lacked an office of general counsel at the time, requested the opinion of the Comptroller General as to whether the Friends of the National Zoo, a private entity, could install coin-operated recorded lecture machines on Zoo property. Proceeds from the machines would be used to train elementary school teachers to conduct guided tours of the Zoo for school children and to publish a guide book to be sold at nominal cost. The Comptroller General advised the Smithsonian that such an arrangement was legally objectionable in that permission to use the Zoo created a valuable privilege and was a lease of government property. Under 40 USC 303(b), money alone may be accepted as consideration for such leases. If money were given in exchange for use of the Zoo, such receipts must be deposited in the Treasury under 31 USC 484. Additionally, if furnishing services was not regarded as consideration, such "voluntary services" would be forbidden by 31 USC 665(b). The Comptroller General stated at p. 652:

> The Congress has jealously guarded its prerogative. . . and had from time to time by general statutes sought to guard against any possibility of encroachment by the executive department. To insure that the executive shall remain wholly dependent upon appropriations it is required (with limited and very specific exceptions) that the gross amount of all moneys received from whatever source for the United States be deposited into the Treasury (R.S. 3617; 31 U.S.C. 484); and that no officer or employee of the United States shall involve the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriation therefore, unless such contract or obligation is authorized by law. (R.S. 3679, 31 U.S.C. 665(a); see also, R.S. 3732, 41 U.S.C. 11). As additional safeguards against unauthorized executive activities, the acceptance of voluntary service for the United States is prohibited (.R.S. 3679, 31 U.S.C. 665(b); . . .

When compared with legislative history of 31 USC 665(b) and 30 Ops. Atty. Gen. 129, the Comptroller General's opinion seems clearly erroneous. Since it does not concern audits or the settlement of accounts under the authority granted the General Accounting Office by 31 USC 71 et seq., it should be considered opinion rather than law and may properly be disregarded.

As the Comptroller General has stated, great confusion has surrounded the prohibition against acceptance of voluntary services. Partly as a result of such confusion a number of agencies have requested and obtained specific statutory authority to accept voluntary and uncompensated service. (e.g., Peace Corps, 22 USC 2509; Vista, 42 USC 2992; OEO, 42 USC 2747; Job Corps, 42 USC 2727; Public Health Service, 42 USC 217b; HUD, 12 USC 1701; Forest Service, P. L. 92-300; National Science Foundation, 42 USC 1870(h); and National Park Service, P.L. 91-357).

The legislative history of the two most recent statutes, concerning the Forest Service and the National Park Service, is instructive. Congress recognized that these agencies had customarily accepted gratuitous services, but enacted the statutes in order to recognize the programs officially, to grant certain employee benefits to the "volunteers" and to allow expenditures for administration of the program and for uniforms for the participants. For example. Senate Report No. 91-1013 recommending passage of the Volunteers in the Parks Act of 1969, states:

> Presently, the National Park Service utilizes the voluntary services of interested persons only under severely restricted circumstances. At relatively few locations, where certain orgainizations have a keen interest in the unit, cooperative arrangements permit public-spirited citizens to serve on a nonappointed basis. To do so, however, they are required to agree, in writing, that they are not employees of the United States and that the United States is not liable for any injuries which they might sustain as a consequence of their voluntary activities. In addition, to the extent required, any expense connected with their service (e.g., uniforms, period costumes, transportation, etc.) is their own or must be paid for from donated funds. Taken together, these restrictions limit the voluntary participation of many people who have the time and the desire to help. (1970 C.A.N. 3580).

Likewise, House Report No. 92-982 recommending passage of the Volunteers in the National Forests Act of 1972, states:

> In the past, the Forest Service has accepted the volunteer services of private citizens of a nonappointed basis. These volunteers were not covered under the Federal Employees' Compensation Act nor the Federal Tort Claims Act. This legislation would extend such coverage plus authorization of such things as meals, transportation, uniforms, awards, and medical examinations as appropriate. (1972 C.A.N. 1659).

The effect of the numerous statutes authorizing acceptance of voluntary services seems to be: (1) elimination of confusion as to executive authority; (2) authorization of expenditures for administration of a formal program and to provide meals, uniforms, and lodging for volunteers; and (3) authorization to accept the services of "dollar a year men" in executive positions to which a salary is affixed by statute.

Although neither the Civil Service regulations nor the Federal Personnel Manual mention the 31 USC 665 prohibition of voluntary services, the Civil Service Commission apparently believes that acceptance of gratuitous services without statutory authority therefore violates the law. (See FPM ltr. #300-8, December 12, 1967, CSC Bulletin No. 300-28 of Dec. 23, 1970, and CSC Bulletin No. 300-30 of April 8, 1971). The sole basis for the Commission's opinion is apparently the Comptroller General's decision with respect to the Friends of the National Zoo, cited above, inasmuch as the Commission seems to agree with our interpretation of the statutory prohibition. (See letter of General Counsel of CSC to Representative Gude, June 8, 1971, and letter of CSC to The White House, April 9, 1969).

Erroneous or not, the views of the Commission carry considerable weight as they may conceivably be considered as policies which the Civil Service Commission is empowered to enforce pursuant to 5 USC 3301 and 3302 and 5 CFR, Part 5.

Compliance with the apparent policy of the Civil Service Commission presents no great difficulty in the present instance, however, since EPA possesses specific statutory authority to cooperate with public and private agencies, institutions, organizations, and individuals in the areas of research, demonstrations, experiments, surveys, investigations, and studies related to the control of pollution. For example, Section 104 of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, provides:

> (a) The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall --
>
> > (1) in cooperation with other Federal, State, and local agencies, conduct and promote th coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution;
> >
> > (2) encourage, cooperate with, and render technical services to pollution control agencies and other appropriate publich or private agencies, institutions, organizations, and individuals, including the general public, in the conduct of activities referred to in paragraph (1) of this subsection;....

The Clean Air Act, 442 USC 1857 et seq., and the Solid Waste Disposal Act, 42 USC 3251 et seq., contain similar provisions.

With the almost certain exception of "members of the League of Women Voters performing typing and office work, etc." and the possible exception of "retired government employees assisting in laboratory duties, including maintenance of equipment and delicate analytical instruments" EPA is thus authorized to cooperate with persons who are willing to perform the gratuitous services about which you inquired.

As stated in the legislative histories of the recent Forest Service and National Park Service statutes, agencies have customarily required "volunteers" to waive any claim for employee benefits, salary, and travel and per diem, as well as rights under the Federal Tort Claims Act. While waiver of employee compensation and benefits is necessary to avoid contractual claims against the government, any requirement for waiver of travel and per diem, and of rights under the Federal Tort Claims Act appears to be a matter for administrative determination. Since the services of cooperating organizations and individuals may be considered useful to the government, however, no policy reason seems to exist which would require waiver of a cause of action for injuries caused by the tortious acts of government employees.

With regard to travel and per diem, payment to cooperating individuals is specifically authorized by statute. 5 USC 5703(c) provides:

> An individual serving without pay or at $1 a year may be allowed transportation expenses under this subchapter and a per diem allowance under this section while in route and at his place of service or employment away from his home or regular place of business...

Such "individuals serving without pay" need not be government employees, as it is well-settled that anyone incurring travel expenses at the request of a federal agency and in futherance of the agency's statutory functions is entitled to travel and per diem. (See 27 CG 183).

In summary:

Private individuals and organizations, such as those you mentioned in your memorandum, may lawfully cooperate with EPA and such cooperation may include the provision of gratuitous services. Such persons must, however, waive any claim for compensation or other employee benefits in advance. They need not waive rights under the Federal Tort Claims Acts, however, and they are entitled to travel and per diem, in the discretion of EPA officials, whenever they are requested to travel for EPA's benefit. A suggested agreement for cooperation is attached.

AGREEMENT FOR COOPERATION WITH THE U.S. ENVIRONMENTAL PROTECTION AGENCY

I agree to cooperate with the U. S. Environmental Protection Agency in activities useful in restoring, maintaining, and enhancing the quality of the environment. I acknowledge that I am subject to no duty, legal or moral, to engage in such activities or to perform such services, and that I am not to be considered a Government employee for any purpose. I hereby waive any and all claims for compensation or other employee benefits, and I specifically waive any and all rights under the Federal Employees' Compensation Act.

I recognize that Federal law, 31 USC 665(b), forbids any Government officer to compensate me for any services rendered in the absence of an advance agreement for compensation.

Signed____________________________

Date______________________________

§ § § § § § §

TITLE: EPA's Use of an Advertising Agency for the Purpose of Publicizing Polluters

DATE: April 6, 1972

FACTS

A series of 60 second television announcements has been prepared by Rink Wells & Associates, an advertising agency in Chicago, Illinois, under contract with EPA. EPA intends to broadcast these announcements throughout the Greak Lakes area. The announcements offer to provide interested citizens with a list of major water polluters and a smaller list of companies which have already taken action to reduce water pollution, together with the addresses and telephone numbers of the officers of these firms. In addition, these announcements urge the public to write and telephone officers of the offending companies, and suggest that the public would like to know the names of major polluters as an aid in deciding which products to buy.

QUESTION

May EPA lawfully conduct such a publicity campaign?

ANSWER

No. Payment of appropriated funds to publicity experts is forbidden by statute. In addition, the proposed announcements contain material which attempts to use a means of enforcement beyond the authority of the environmental acts.

DISCUSSION

5 USC states: "Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose." This provision is a codification of language in a 1913 statute authorizing appropriations for the Interstate Commerce Commission. 38 Stat. 212. Its exact meaning is unclear. It is common knowledge that executive agencies maintain public affairs offices, have maintained such offices for many years, and that Congress has continued to appropriate funds for these agencies without objection.

Although the precise intent of 5 USC 3701 is obscure, especially in view of subsequent agency practice and tacit Congressional approval, we may infer that the statute means at least this much: (1) Hiring of public information personnel is authorized; (2) Such personnel may not use their office to publicize the virtues of the Agency or its individual officers, except insofar as straight information may reflect credit; and (3) Contracting for the services of outside "publicity experts" to enlist public support for agency programs or publicize the work of the agency is forbidden unless specifically authorized by statute. If the proposed EPA television announcements purported to disseminate straight information or simply encourage citizen action respecting the environment, we would have no legal objection provided it was administratively determined to be for necessary programs of EPA. But one rationale of the campaign is said to be "to use advertising in such a way that it will get viewers and listeners to recognize the efforts of the E.P.A." If 5 USC 3701 has any meaning at all, it must surely forbid publicity for such a purpose.

We must now decide whether funds for the payment of "publicity experts" have been "specifically appropriated". Section 5(c) of the FWPCA authorizes the dissemination of basic data on chemical, physical, and biological water quality and other information relating to water pollution and its prevention and control. Likewise, the National Environmental Policy Act, Section 102 directs all agencies of the Federal government to make available to public agencies, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment. The NEPA further directs that the federal statutes shall be administered and interpreted in accordance with the policies of NEPA to the fullest extent possible. But the 1972 appropriation act for EPA, PL 92-73, makes no specific mention of publicity or payment of publicity experts. It is interesting that the same appropriation act authorizes certain types of publicity for the Department of Agriculture, while the appropriation for EPA merely contains the usual language authorizing expenditures for the necessary functions of the Agency. We believe that the general language of the FWPCA, NEPA, and the appropriation act falls short of a specific authorization for the payment of publicity experts.

Even if it were determined that such publicity is a necessary function of the Agency and authorized by the appropriation act, our problems would not be solved. Even lawful activities may be subject to limits. The FWPCA provides that corporations and individuals violating water quality standards may be fined or, in some cases, even imprisoned. But the Act does not provide for punishment by government-induced boycott or recruitment of volunteer "enforcers" to write and telephone officers of companies alleged to be polluters. One announcement says, "We're either going to get them to do something about water pollution or we're going to drive them crazy." Citizens are urged to telephone the polluters at their offices and even their homes--and at all hours. Certainly, an individual's expression of concern to a corporation about its activities is a legitimate means of redress. But we must realize that not all people will express their concern in a reasonable and decent manner. It may be doubted that EPA really wishes to establish an army of "crank" telephone callers to "Pressure the Polluters." Such pressure may indeed be effective--but it is not the sort of legal pressure authorized by the environmental acts.

Another legal problem exists. It does not concern the environmental acts, but rather the rules applicable to television stations. The "fairness" doctrine of the Federal Communications Commission is stated in 47 CFR 73.679: "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (the script, etc.) and. . . offer of a reasonable opportunity to respond over the licensee's facilities."

Thus, TV stations may be unwilling to broadcast these announcements, as the FCC might direct them to offer "equal time" to the alleged polluters.

We regret that our opinion seems to disparage a more "activist" approach to environmental problems. If a private group were to pursue this action, we might heartily approve. Indeed, some of us might even be considered admirers of "The Fox" of Des Plaines, Illinois. Perhaps reluctantly, we believe that the government must act less flamboyantly.

§ § § § § § §

CIVIL RIGHTS

TITLE: Compensation for a Witness at an Agency Hearing

DATE: August 14, 1973

FACTS

An EPA employee alleged that he had been the victim of racial discrimination in that he had been, inter alia, denied promotion. He requested a hearing pursuant to 5 CFR 713, and several EPA employees were called to testify.

In addition to EPA employees, Mr. Art Noble, a former Agency employee, was requested to appear as a witness. Mr. Noble was present for three days and has requested the sum of $30 per day as compensation.

The Region IX Management Division has stated that no authority exists for the payment of witness fees under the above circumstances.

QUESTION

May EPA pay a former employee for attendance as a witness at an Agency hearing where no compulsory process exists for requiring testimony?

ANSWER

Yes; a non-government employee may be paid travel and per diem authorized by 5 USC 5703.

DISCUSSION

A subpoenaed EPA witness is entitled to fees and allowances allowed by statute for witnesses in the courts of the United States. 5 USC 503.

The fees and allowances provided by statute for witnesses in federal courts are $20 per day and 10 cents per mile, although a witness is entitled to an additional allowance of $16 per day if the hearing is so far removed from his residence that he is unable to commute. (28 USC 1821).

The Comptroller General has ruled, however, that 5 USC 503(b) is not the executive statutory authority for payment of witnesses, but simply establishes that witnesses who are compelled to give testimony (subpoenaed) are entitled to payment as a matter of right. The GAO has indicated that where a witness is under no legal compulsion to testify, 5 USC 5703 provides authority to agencies to pay a witness' travel expense and a per diem allowance not to exceed $25 per day, unless the witness' actual and necessary expenses exceed the $25 limitation. In such cases agencies may authorize payment of a larger sum, up to a limit of $40 per day. (See 48 CG 110, August 26, 1968 and B-164455, March 24, 1969).

A non-government witness who testifies on behalf of EPA before a hearing board or Board of Contract Appeals without having been served by a subpoena may thus receive travel and per diem in accordance with OMB Circular A-7, October 10, 1971 and the EPA Travel Manual.

TITLE: Application of NEPA to Activities of EPA

DATE: February 25, 1972

PROBLEM

The CEQ Guidelines exempt "environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency" from the NEPA requirement of preparing environmental impact statements. On the basis of this guideline, none of the regulatory activities taken by EPA since its inception have been accompanied by environmental impact statements.

In Kalur v. Resor, the Federal District Court in the District of Columbia held that permits could not be issued under the permit program without the preparation of environmental impact statements. In so holding, the court rejected a defense based on the CEQ Guidelines and ruled broadly that "There is no exception (from NEPA carved out for those agencies that may be viewed as environmental improvement agencies". After the Kalur decision, a suit was filed challenging the new stationary source emission standards under the Clean Air Act, on the ground of failure to file an environmental impact statement. Reserve Mining Company has challenged our actions in its case on the ground of failure to file an environmental impact statement.

The Senate water bill contains a limited exemption from NEPA for the permit program. CEQ, since the Kalur decision, has proposed a broadening of the Senate provision to include all environmental regulatory activities engaged in by any Federal agency.

In light of these developments, it is imperative that this Agency formulate a position with respect to whether there should be legislation exempting environmental regulatory activities from NEPA.

PROPOSAL

I would suggest that EPA support two provisions. The first provision would be for inclusion in the pending water bill, in place of the present 511(d). It is limited to the water area, since we understand the House Public Works Committee will not tamper with the application of NEPA in any other area. We would propose supporting the following language for inclusion in the water bill:

> The requirements of the National Environmental Policy Act of 1969 (83 Stat. 852) shall not apply to environmental protective regulatory actions taken under this Act on or after January 1, 1970 by the Environmental Protection Agency or its predecessor agencies, including but not limited to the setting or approval of standards and effluent limitations and other requirements

> and the issuance of permits under Section 402; provided that this Act shall not be construed to authorize the Environmental Protection Agency to take any regulatory action designed to protect water quality where such action would have a deleterious effect on other aspects of the environment outweighing the benefit to water quality.

I would further propose supporting the following language as an amendment to NEPA, in the event that the question of amending NEPA itself arises:

> The requirements of this Act shall not apply to environmental protective regulatory actions taken on or after January 1, 1970 by the Environmental Protection Agency or its predecessor agencies under any Federal statute presently in effect or hereafter enacted; provided that the Environmental Protection Agency shall not take any regulatory action designed to protect one aspect of the environment without balancing the effects of such action on other aspects of the environment.

ISSUES PRESENTED

These proposals raise the following issues:

1. Is there any reason to exempt EPA's regulatory activities from NEPA? If so, can we justify a limitation of the exemption to EPA, without extending it to other agencies?

2. Should the permit program be exempted from NEPA? Should this exemption be confined to permits for presently existing discharges or should it extend to permits for future discharges?

3. Should other regulatory actions of EPA be exempted, including regulatory and standard-setting action in air, pesticides and radiation as well as water?

DISCUSSION

I. Reasons for exempting EPA, and only EPA.

1. The purpose of NEPA was to force agencies that had not heretofore considered the environment to factor environmental concerns into their decision-making. The idea was that the benefits accruing from the agencies' primary mission -- should be balanced against environmental costs. The basic statutory authority for most agencies did not authorize them to consider the environmental costs of their activities. Thus, for example, the AEC had ruled, prior to NEPA, that the Atomic Energy Act did not authorize it to regulate thermal discharges from nuclear power plants, and this ruling had been upheld in the courts. New Hampshire v. A.E.C., 406 F.2d 170 (1st Cir. 1969), certiorari denied 395 U.S. 962. NEPA was necessary to remedy this situation.

This rationale for NEPA applies to all Federal agencies other than EPA. It does not apply to EPA, however, since EPA's mission is to protect the environment. EPA has the statutory authority to protect the environment, and NEPA is not needed to supplement this authority.

2. It could be argued that EPA's procedures for protecting the environment do need the help of NEPA. The argument would be that without NEPA, EPA will only consider the effects on water when it issues and so on, rather than considering the impact on the total environment in each case.

It seems to me that the Reorganization Plan that created EPA negates this argument. The very purpose for the creation of EPA was to enable a consideration of the total impact on the environment of each regulatory activity, and to eliminate the attitude that the regulation of air, water, pesticides and radiation were separate, unrelated compartments.

However, to eliminate any doubts as to EPA's statutory authority to take an integrated approach to environmental regulation, I have included a proviso in each of my statutory proposals. I believe that this proviso would be sufficient, without subjecting all our activities to the NEPA process.

II. Exemption for the Permit Program

1. The basic argument for exempting the permit program itself has about 20,000 applications. We are already having great difficulty processing this number of applications under present procedures. Adding the NEPA procedure would greatly overburden the process and might well cause a complete breakdown.

2. It has been suggested that the NEPA process would only have to be gone through for a small percentage of the discharges, on the ground that NEPA applies only to "major Federal actions significantly affecting the quality of the human environment". It is argued that there could be an administrative definition of this language which would cover only a small portion of the discharges.

I think this argument is unrealistic. Any administrative definition in this area would be subject to review by the courts. The judicial trend in this area has been to interpret the Act to apply to any action which has a significant local impact, even though it may be relatively trivial from a national point of view. For this reason, I think it probable that the vast majority of permits could not be safely issued without impact statements, if NEPA applies to the permit program.

3. It has also been suggested that the administrative burden could be alleviated by preparation of basin impact statements. However, while consideration of water pollution problems on a basinwide basis is undoubtedly important, I doubt that it could be used to obviate individual impact statements for each discharge.

Even within the framework of a general basin study, individualized consideration of each discharge will inevitably be necessary.

4. I should add that if the new water bill passes as presently drafted, it will enormously increase the administrative burdens involved in the application of NEPA. In addition to the 20,000 dischargers covered by the permit program as presently established, the new bill would cover approximately 105,000 feed lots. In short, we would be dealing with an additional burden of approximately 215,000 permit applications, at least a substantial percentage of which would require environmental impact statements.

III. Should the exemption for the Permit Program be limited to existing discharges?

1. The administrative burden would be greatly eased by an exemption for the permit program applicable to existing discharges. However, a substantial burden would remain, if future discharges are within NEPA, and undoubtedly the burden would increase through the years. The extent of the burden would depend on a large degree on how the cutoff point is defined. One proposal is to apply NEPA to discharges from plants going on line in the future and to increased discharges from existing plants. Cast in these terms, NEPA would apply to any permit for a plant which increased production, unless there was a corresponding improvement in treatment equipment. Under this formulation, the administrative burden would be extremely substantial.

2. The rationale that has been advanced for applying NEPA to future discharges is to give EPA, through the permit program, power to assess the environmental effects of the production and plant siting decisions which give rise to new or increased discharges. Thus, for example, it is argued that the environmental effects of the plant location should be assessed before a permit is issued. I would oppose use of the permit program and NEPA for this purpose, for three reasons.

First, I think EPA has its hands full in addressing itself through the permit program to water pollution. I do not think the permit program should undertake the additional task of assessing the other environmental effects of production and plant siting decisions.

Second, the application for a discharge permit generally comes at a time where the plant siting and production decisions leading to the discharge have already been made and have entailed substantial investments. At this point it is far too late to exercise realistic control of these decisions. If any scheme is devised for federal control of production and plant siting decisions in terms of their overall environmental effects, a regulatory scheme will have to be devised to require a federal permit at a much earlier stage than is possible under a discharge permit program.

Finally, I question whether it is desirable for a single Federal agency to exercise comprehensive control of plant siting and production decisions, even when this is done in the name of the environment. At the very least, EPA ought not to take on such a task without a more explicit indication from Congress that it wishes us to do so.

IV. Exemption for other EPA regulatory actions.

1. A substantial administrative burden would be involved if NEPA were applied to other regulatory activities of this Agency. Here the burden relates to time as well as quantity. As you know, under the Clean Air Act you are required to take a number of actions within relatively stringent periods of time. The new water bill will also impose stringent time limitations for some far reaching regulatory actions. Many of these time limitations simply could not be complied with consistently with NEPA. for example, I see no way in which you could take action on 50 State implementation plans under the Clean Air Act within the four months required by the Clean Air Act, and still go through the environmental impact procedure before completing action on each plan.

In addition, there is also a problem of the sheer quantity of regulatory actions that this Agency takes. The problem is most acute in the pesticides area. During calendar year 1971, 350 tolerances were issued establishing parts per million of pesticides allowed as residues on certain plants. During fiscal year 1971, there were 4,491 new applications for registration under FIFRA, 10,651 amendments to existing registrations, and 8,500 renewals of existing registrations. Of course, I do not know how many of these actions would be considered major Federal actions within the purview of NEPA. However, I expect that many Federal judges would be inclined to hold that virtually any pesticide registration would require an environmental impact statement.

2. An additional reason for exempting the environmental regulatory activities of EPA is a basic conflict between the philosophy of NEPA and the philosophy of environmental regulation. As we understand it, NEPA embodies a "go slow" approach. The purpose of NEPA is to prevent major actions which have an impact on the environment from being taken without a clear idea of what the impact will be.

On the other hand, the "go slow" approach has not been and should not be the philosophy of environmental regulation. In many areas EPA has adopted regulations without a full understanding of the environmental impact, on the theory that if we wait until we obtain that understanding, it may be too late. Our philosophy, in effect, has been to take some action where there is a recognized environmental problem, even though not enough is known for a complete assessment of the impact of our action. This philosophy would be extremely difficult to implement under the requirements of NEPA.

In short, where an action produces pollution, delay for the purpose of fully studying the environmental effects is beneficial. But when an action is designed to regulate or abate pollution, delay for the purpose of fully studying environmental effects simply allows the pollution to continue. For this reason, NEPA should not apply to the regulation or abatement of pollution.

A case in point is the adoption of thermal standards for Lake Michigan. When you recommended to the Lake Michigan conference that it adopt a closed cycle cooling requirement, you recognized that very little is known as to the effects of thermal discharges. Consequently, under EPA, it would have been virtually impossible to balance the costs of such a requirement against the environmental effects. However, instead of adopting the "go slow" approach of NEPA, your approach was to go ahead despite the uncertainty. Another case in point is Reserve Mining Company. We have taken action there despite an admitted lack of understanding as to long-term effects on Lake Superior, simply because we feel that further delay might lead to damaging a priceless resource. On the other hand, Reserve -- in its letter to you of February 5, 1972, urging application of NEPA, as well as in other presentations -- has adopted the "go slow" approach, arguing that it should not be forced to alter its present waste disposal practice until there is a fuller understanding of the environmental impacts of this practice and its alternatives.

3. I expect that if NEPA is applied to this Agency, its primary utilization will be by industry, in delaying and defeating our attempts to impose environmental regulation. It seems to me that if the public can be convinced of this fact, we should have no trouble in obtaining an exemption from NEPA.

4. In view of the impact of these proposals on the Office of Federal Activities, the Office of Legislation, and the Air, Water, Pesticides and Radiation Programs, I have sent copies of this memorandum to Mr. Fri, Mr. Mosiman and Mr. Dominick for their comments.

§ § § § § § §

TITLE: Application of National Environmental Policy Act to Permit
Program - Number of Impact Statements Required

DATE: February 24, 1972

In connection with the various legislative proposals to exempt the permit program from NEPA, I asked the Office of Refuse Act Programs for some figures that would give us some idea of the number of permits that would require environmental impact statements if NEPA is applicable to the program. Specifically, I asked whether they had any breakdown of the number of applications in terms of gallons per day of discharge. My thought was that, in all likelihood, any permit discharge of more than approximately 10,000 gallons a day would probably be viewed by most judges as a "major" Federal action requiring an impact statement under NEPA (although I recognize that this cutoff point could vary up or down depending on the constituents of the discharge and the nature of the receiving body of water).

The attached table represents a summary of the Refuse Act applications received by Region IV. Of the applications, 80% involved daily average dischargers of 10,000 or more gallons per day. If these figures are extrapolated to the 20,000 applications which the program as a whole has received, and 10,000 gallons per day is accepted as a valid cutoff point for major Federal actions under NEPA, the indication is that the permit program would require 16,000 environmental impact statements.

Assuming that we were able to persuade the courts to accept a higher figure -- such as 100,000 gallons a day -- as the cutoff point, the attached figures indicate that over 50% of the permits would still require environmental impact statements -- or over 10,000 environmental impact statements nationwide.

DISTRIBUTION OF REFUSE ACT APPLICATIONS RECEIVED BY REGION IV IN TERMS OF TOTAL DAILY FLOW

Daily average Discharge in Gallons Per Day	Number of Applications	Per Cent	Cumulative # of Applications	Cumulative Per Cent
One billion or more	19	1%	19	1%
Between one hundred million and one billion	27	2%	46	3%
Between ten million and one hundred million	81	6%	127	9%
Between one million and ten million	196	14%	323	23%
Between one hundred thousand and one million	402	29%	725	52%
Between ten thousand and one hundred thousand	391	28%	1,116	80%
80,000 - 100,000	39	3%	764	55%
60,000 - 80,000	59	4%	823	59%
40,000 - 60,000	82	6%	905	65%
20,000 - 40,000	120	8%	1025	73%
10,000 - 20,000	91	7%	1116	80%
	391	28%		
Between one thousand and ten thousand	188	13%	1,304	93%
Less than one thousand	86	6%	---	---
TOTAL NUMBER OF APPLICATIONS	1,390			

Number of applications having daily average discharge in excess of 50,000 gallons per day: 861 or about 62%.

TITLE: Section 309 of the Clean Air Act -- Environmental Impact Review

DATE: March 11, 1971

Section 309 of the Clean Air Act [1] mandates that we "review and comment in writing", with the written comment to "be made public at the conclusion of any such review", on the environmental impact of (1) proposed Federal legislation, (2) newly authorized Federal construction projects and major Federal agency actions for which we receive a draft 102 statement, and (3) proposed Federal regulations.

Subsection (b) of Section 309 says that if we determine that any matter we have reviewed is "unsatisfactory", we must "publish" that determination and must refer the matter to CEQ. (Interestingly enough, the statute in this regard refers to "the standpoint of public health or welfare" as well as environmental quality).

This section was inserted by Senate staff people in order to force total compliance with what they felt was the intent of section 102 of NEPA and also to force us to "make public" our comments. There is no legislative history, and the staff people refused to negotiate in any way on this language.

The section probably is a direct result of (a) Mr. Train's November, 1970 statement to the affect that 102 statements would not be made public on an interim basis, and (b) the failure of any of the construction projects in the "pork barrel" legislation to be accompanied by 102 statements.

Our analysis of this section leads to the following recommendations which are submitted for your approval and information.

---

[1] "(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action other than a project for construction to which section 102(2)(c) of Public Law 91-190 applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

"(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality."

1. Our written comments under subsection (a) will be "made public" by this regard refers to "the standpoint of public health or welfare" as well as environmental quality).

2. They will be made available on the day we send our comments to the lead agency. 2/

3. In those instances where we conclude in our comment that the proposal is "unsatisfactory", we will publish in the Register our "determination", be made available in the Office of Public Affairs.

4. These procedures will be announced via a Notice (copy attached) in the Federal Register.

2/ The CEQ guidelines (Section 12(b) differ in regard to the timing of making comments available to the public. For legislative proposals, the comments are to be made available when furnished to Congress. For "administrative actions", the comments need not be made available until the final text is furnished to the Council.

NOTICE

ENVIRONMENTAL PROTECTION AGENCY
Office of the Administrator

Notice of Compliance with Section 309 of the Clean Air Act, as amended

Notice is hereby given of the procedures to be followed by the Environmental Protection Agency in complying with Section 309 of the Clean Air Act, as amended, 42 U.S.C. 1857 *et seq.*, Public Law 91-604, 84 Stat. 1676. Section 309 calls for the review and comment by the Administrator on the environmental impact of matters relating to his responsibilities under the Clean Air Act and under other provisions of his authority.

Copies of environmental impact comments transmitted by the Administrator to the originating agency will be made available in EPA's Office of Public Affairs and will be mailed to those requesting them.

In the event that the Administrator determines that a proposal is unsatisfactory, such determination will be published in the Federal Register and the full written comments will be made available in EPA's Office of Public Affairs and will be mailed to those requesting it.

Dated: William D. Ruckelshaus
March____, 1971 Administrator

DRAFT

TITLE: NEPA Aspects of the Award and Administration of EPA State and Local Assistance Grants

DATE: August 4, 1972

Your June 29 and 30, 1972 memoranda request advice concerning NEPA review procedures in relation to the award and administration of EPA state and local assistance grants. This memorandum includes a narrative discussion of pre-award and post-award NEPA grant administration procedures, followed by responses to the specific questions set forth in your June 30, 1972 memorandum. Responses to issues presented during the recent OFA San Francisco and New York conferences are reflected in the narrative discussion.

ADMINISTRATION OF STATE AND LOCAL ASSISTANCE GRANTS

EPA regional offices are responsible for the award and administration of assistance to state and local governments through three principal mechanisms--planning grants, program grants, and construction grants. 1/ The award and administration of such grants are governed:

1. by the interim general grant regulations (40 CFR, Part 30), which were promulgated on November 27, 1971 (36 F.R. 22716) and became effective on January 1, 1972.

2. by the appropriate subpart of the interim supplemental regulations for state and local assistance grants (40 CFR, Part 35), which were promulgated on June 9, 1971 (37 F.R. 11650), and became effective on July 1, 1972. The regulations supplementing the general grant regulations are set forth in subparts A, B, and C, respectively, of these Part 35 regulations.

A manual has recently been published by the Grants Administration Division which provides supplementary grant administration materials and guidance.

EPA GRANT PROGRAMS

While all EPA grants are awarded subject to the requirements of NEPA (see 40 CFR § 30.401(a), each of the three types of state and local assist-

---

1/ For purposes of discussion in this memorandum, EPA demonstration grants to state and local governments, the regulations for which will soon appear as Part 40 of Title 40 CFR, are considered identical with respect to NEPA review procedures, to the construction grants covered by the regulations in subpart C of 40 CFR, Part 35.

ance grants requires a different analysis of appropriate NEPA review procedure. 2/

PLANNING GRANTS

Regional offices award water quality management planning grants (see 40 CFR § 35.200 et seq.) and solid waste planning grants (see 40 CFR § 35.300 et seq). NEPA review would usually not be required or even feasible at the time of award of such grants, but should be effected as a part of the performance and evaluation of the planning project, particularly in conjunction with the submission to the Regional Administrator of the interim or final plan (see 40 CFR §§ 35.225 and 35.330-3). It should be noted that EPA water pollution control planning requirements for basin planning (40 CFR § 35.150-2) are applicable even when EPA does not fund the planning process, insofar as compliance with an effective basin and metropolitan or regional plan is a precondition to award of a wastewater treatment plant construction grant (40 CFR §§ 35.835-2 and 35.835-3).

PROGRAM GRANTS

Generally, NEPA review would not be required in conjunction with the award of an EPA program grant (Subpart B of 40 CFR, Part 35). Such grant provide assistance from year to year to state and local air pollution control agencies (40 CFR § 35.501 et seq.) and to state and interstate water pollution control agencies (40 CFR § 35.551 et seq.). However, regional office personnel can seek to assure better state and local coordination with NEPA procedures applicable to the planning and construction grant programs by reviewing the state and local procedures essential to NEPA review which are reflected in the program plans submitted for approval by the Regional Administrator (see 40 CFR § 35.525 for air program and §35. 575 for water program plan requirements).

It should also be noted that grants awarded to interstate planning agencies pursuant to §106 of the Clean Air Act, as amended, 42 U.S.C. §1857c-1, are essentially planning grants, and should be administered for purposes of NEPA review in the same manner as the water and solid waste planning grant programs previously discussed.

2/ "NEPA review" refers to either the preparation of a final environmental impact statement plus the passage of thirty days or the filing of a negative declaration.

Factors which govern the decision to prepare an EIS for a particular project are not discussed in this memorandum. Specific policy and legal determinations are being developed in conjunction with the issuance of final NEPA regulations. Interim guidance was furnished to regional personnel in § 6.21 of the proposed regulations published on January 20, 1972 (37 F.R. 881).

CONSTRUCTION GRANTS

In the case of construction grants, including demonstration projects involving construction, compliance with NEPA requirements must be obtained in conjunction with the review of applications for such projects and must be completed prior to the award of such grants. Inasmuch as this constitutes EPA's largest state and local assistance grant program, the ensuing discussion will center upon the construction grant program.

PRE-AWARD NEPA REVIEW

NEPA review must be initiated and completed at the earliest possible time during the application review period, in order to comply with the statutory requirement (42 U.S.C. 4322(2)(c)) that "Copies of such statement and the comments and views of the appropriate Federal, State and local agencies . . . shall accompany the proposal through the existing agency review process." Accordingly, either the negative declaration or the EIS must accompany the grant application through the agency review process, to the maximum feasible extent.

Construction grant applications which are received without an adequate environmental assessment must either be returned to the applicant or placed in suspense until an adequate environmental assessment is received. While review of EPA grants is to be completed within ninety days after submission of an application, provision is made (40 CFR § 30.302-1) for the suspension of this time period when the applicant is requested to furnish necessary supplemental information, such as the furnishing of an environmental impact assessment or supplemental analyses of environmental impact.

Generally, NEPA review must be completed prior to the award of an EPA grant. Only in exceptional circumstances, such as where an award must be made prior to the expiration of a state's allocation of construction grant funds, an award may be made for fiscal purposes (cf. 40 CFR § 30.305-2) if a special condition is incorporated into the grant agreement (pursuant to 40 CFR § 30.400 and with the assistance of Regional Counsel) to assure that no project work will be performed after the award until the Regional Administrator notifies the grantee that EPA review procedures have been satisfactorily completed. (Suggested language for such a special condition is furnished in the response to Question No. 7, infra.)

NEPA review must be conducted once for each "grant" or "continuation grant". 3/ In addition, when applications for seemingly minor grants which are in reality key or irreversible elements of larger schemes are received, regional personnel must determine whether NEPA review is re-

---

3/ EPA assistance is given for a "project" "budget period" through a "grant", a "continuation grant", or a "grant amendment", as these terms are defined in Part 30 of 40 CFR. However, practice varies among the various EPA regions, as well as among the state agencies which must certify projects, with respect to the allowable scope of a construction grant project.

quired for the entire "project" or sewage treatment plant, and not just for the grant for which the application has been received. 4/ With respect to requests for additional EPA assistance subsequent to NEPA review, Sec. 10(a) of the CEQ Guidelines requires that "when actions being considered differ significantly from those that have already been reviewed pursuant to Section 102(2)(C) of the Act, an environmental statement should be provided." In any event, responsibility for the determination whether to conduct NEPA review, and concerning the extent of such review, rests with EPA and cannot be relegated to either the applicant or the state agency, in effect, on the basis of a project's scope as defined in a grant application. In short, it is the responsibility of EPA regional personnel to determine whether the scope of any required NEPA review relating to a sewage treatment plant, or any part thereof, should be coextensive with, or greater than, the scope of a project for which a grant application has been received.

In the event that pre-award NEPA review indicates that changes would be made in the project which would increase the cost of the project or result in any changes (as defined in 40 CFR § 30.900) in the plans, specifications or other technical project data submitted with the application, the applicant should submit an amendment to its application or a revised application so that such changes will lie within the scope of the project approved at the time of the grant award, or they must subsequently be reflected as approved project changes through a grant amendment (40 CFR § 30.901), so that the costs of such project changes may be considered as allowable project costs for which payment may be made within the dollar ceiling of the grant.

If an applicant proceeds with construction prior to an EPA grant award, whether or not an EPA request to defer construction until completion of NEPA review has been made;

1. Construction costs incurred during the period of NEPA review, prior to award, would not be allowable project costs under any grant subsequently awarded (see the final sentence of 40 CFR § 30.305-2), unless a deviation is granted under 40 CFR § 30.1001.

2. In addition, work performed by a grantee under such circumstances may have to be abandoned or changed as a precondition to subsequent EPA grant support on the basis of findings made through the NEPA review process.

4/ The construction of a sewage treatment plant may be "split" pursuant to principles discussed in a December 3, 1971 memorandum from this office and in Program Memorandum No. 72-15 dated June 2, 1972 from the Director, Division of Municipal Wastewater Programs.

Refusal by the applicant to cooperate with NEPA review could by itself constitute a basis for disapproval of a grant award by the Regional Administrator, at least where EPA concludes in its review that the project is environmentally unsound. If a grantee proceeds with construction after submission of an application and prior to grant award during the process of NEPA review and no grant is ultimately awarded, based on NEPA grounds, any failure of the applicant to comply with pre-award NEPA procedures could be the basis for an adverse responsibility determination upon any subsequent grant application (see 40 CFR § 30.307). In summary, an applicant who proceeds with construction of a project prior to notification that NEPA review has been successfully completed does so at a considerable risk.

POST-AWARD EIS'S

While NEPA review of construction grants must generally be accomplished prior to grant award, it will sometimes be necessary to prepare an EIS after an award of a construction grant--for example, where an injunction halts project work on NEPA grounds, or where the Regional Administrator concludes, upon the initiative of third parties or as a result of internal EPA decision, that a project for which a negative pre-award declaration was filed warrants preparation of a post-award EIS.

Where post-award NEPA review is voluntarily initiated, all or a portion of the project work should usually be stopped pending completion of the NEPA review. This should be done because of the risk inherent in electing to allow project work to continue concurrent with post-award NEPA review, that is, substantial project costs may be incurred for work which may have to be abandoned or substantially changed as a result of findings made through the NEPA review. Where it is necessary or prudent to stop further project work, the appropriate grant action would be the issuance of a stop-work order to suspend project work or a bilateral agreement to suspend project work, effected through a grant amendment, or, in some cases, the issuance of a termination notice.

It should be noted that withholding of payment of EPA grant funds is not authorized, except for the provision in 40 CFR §30.602-1 for retention of up to ten percent of grant payments, which retention must be based upon a good cause determination inasmuch as retention of grant payments due for costs already incurred by the grantee on project work would be punitive. Where post-award NEPA review is required, retention of grant funds would usually not be appropriate, except in the case of violation of a special condition precluding further project work pending completion of NEPA review.

Project work supported by an EPA grant may be suspended pursuant to 40 CFR §30.902 and General Condition No. 4 of the General Grant Conditions (Appendix A to Subchapter B of 40 CFR) and may be terminated pursuant to 40 CFR §30.903 and Article 5 of the General Grant Conditions (Appendix A to Subchapter B of 40 CFR). These provisions are quite explicit and contain substantial safeguards for both the grantee and the Government--for example, the requirement of consultation with the grantee prior to initiation of either a suspension or termination action, of prior approval of the suspension or termination action by an EPA official at a level above that of the personnel actually administering the grant, and for the payment of costs incurred by the grantee prior to the suspension or termination action.

Obviously, the clear intent of the suspension and termination provisions requires that a maximum effort be made to arrive at a course of action by bilateral agreement with the grantee. However, where agreement is not possible, unilateral action by EPA is authorized under both the suspension and termination provisions. Careful analysis should be made to determine whether all or only a part of the project need be affected inasmuch as both the suspension and termination procedures are applicable to all or any part of an approved project. Action under these procedures in any instance of project delay or stoppage is in the best interests of the grantee, since the costs of the delay or work stoppage, which normally would not be included in the approved project budget or grant amounts may be recognized in the suspension or termination agreement as allowable project costs.

In any case where a project is changed as a result of post-award NEPA review, it is essential to incorporate any changes in the previously approved project into a grant amendment pursuant to 40 CFR § 30.901, so that the costs of such changes will be allowable project costs (40 CFR § 30.602, as amended, 37 F.R. 11650). If an increase in project funds is required as a result of NEPA review, the approval of the state should be obtained, both to assure that such funds are available from the state allocation for construction grants and to assure payment of required state matching funds. If NEPA review results in substantial project changes (e.g., project cost, site, method of treatment), as originally certified by the state agency and approved at the time of grant award, it will generally be necessary to terminate the original grant and obtain a new state certification and a new grant for the revised project; grant amendments may only be entered into for changes which do not substantially alter the objective or scope of a project (40 CFR § 30.901). We note that in some states any project change requires prior approval, in addition to EPA requirements.

A partial termination of a grant, which may be issued with an explicit provision that it is without prejudice to a subsequent grant amendment or a new grant application, may be in the best interest of the grantee and its state, and the more prudent course of action for all parties concerned, in cases where substantial NEPA questions are raised concerning one aspect of a project subsequent to award, but prior to initiation of construction for that portion of the project, since, if that portion of the project fails to survive NEPA administrative review or judicial action and a final determination is not obtained until after the expiration of the allocation period for the project funds, such funds may be lost to the grantee and to its state, due to the statutory reallocation requirements.

RESPONSES TO OFA QUESTIONS

Our comment upon the specific questions asked in your June 30, 1972, memorandum is as follows:

QUESTION No. 1

May EPA construction grants be awarded prior to completion of NEPA review (e.g., to prevent expiration of a state's allocation)?

ANSWER

Grant awards may not be made until NEPA review procedures have been completed, that is, until a negative declaration has been filed or until thirty days after the filing of a final environmental impact statement. In exceptional circumstances, where the Regional Administrator determines that a grant award must be made (for example, to prevent expiration of a state's allocation under the construction grant program), an award may be made upon condition that the applicant/grantee will not proceed with all or specified portions of the project unless and until it has been satisfactorily completed. (A suggested form for such a condition is furnished in the response to Question No. 7.) The applicant and the state should be advised that this course of action (award prior to completion of NEPA review) may entail considerable risk, since the grant may have to be terminated subsequently and the funds awarded under the original grant may be subject to reallocation to other states if deobligated after the allocation period as a result of NEPA post-award review.

QUESTION No. 2

What grounds can be used to refuse to award a grant for a project on the State's priority list?

ANSWER

State certification of priority for a project is one precondition to EPA consideration of an application for a construction grant award. In the course of such consideration the Regional Administrator must determine that the proposed project complies with a number of statutory and sub-statutory requirements which are reflected in the general grant regulations (specifically, Subpart C of 40 CFR, Part 30) and in the supplemental state and local assistance grant regulations (40 CFR §§ 35.830 and 35.835). Compliance with NEPA is one such condition (see 40 CFR § 30.401(a)). A determination by a Regional Administrator as a result of NEPA review that a proposed project is environmentally unsound would, by itself, constitute an adequate basis for disapproval of a construction grant for award.

QUESTION No. 3

When an impact statement must be prepared on an on-going project how can work stoppages be used on all or part of the project to ensure EPA does not continue to commit itself to an action that the EIS may show must be changed? What financial liability may EPA incur and what are the risks?

ANSWER

Post-award suspension procedures are discussed in the introductory portion of this memorandum. The grant suspension provisions (40 CFR § 30.902 and General Condition No. 4 in Appendix A to Subchapter B of 40 CFR) set forth in considerable detail the ramifications of a unilateral suspension action by EPA. Bilateral suspension agreements should address the parties' respective liabilities in comparable detail. It should be noted that, in addition to EPA and the grantee municipality, the grantee's state has an important role with respect to both distribution and use of the state FWPCA allocation and to any state matching share of project costs. The state agency must be consulted on all important construction grant actions.

QUESTION NO. 4

If an impact statement indicates significant changes must be made in a project, but the grantee refuses to make the necessary changes, what recourse does EPA have? What liabilities may it incur under the various actions it may take, and what are the risks?

ANSWER

See the detailed discussion, supra, concerning post-award grant administration aspects, including project changes, grant amendments, suspension, termination, and allowable costs. More detailed discussion of these subjects is contained in the grant regulations and in the grant manual. It should be noted that action under the pending or current grant is not the exclusive remedy. An applicant/grantee can be found non-responsible with reference to future grant awards (40 CFR §30.304). Also, EPA or the state may initiate enforcement action to stop a grantee from proceeding with a project unilaterally. The cooperation of the state agency may be obtained for remedies available under state laws.

QUESTION NO. 5

If the grantee does agree to make changes, what liabilities does EPA incur?

ANSWER

See the discussion, supra, concerning both pre-award and post-award project changes, particularly the requirement for amendment or revision of an application or for the issuance of a grant amendment to insure allowability of project costs. Generally, EPA does not incur liability unless the changes are reflected prior to award in the grant agreement or after the award through a grant amendment. It should be noted that in some instances, project changes could result in a decrease in project costs.

QUESTION NO. 6

If EPA, because of issues brought to its attention by the public or other sources, determines without an EIS that a grant it has made is environmentally unsound, can it stop the project? What can it do and what liabilities may it incur?

ANSWER

All projects funded under EPA grants are subject to suspension or termination for any rational reason, as previously explained in this memorandum. Generally, in such circumstances, EPA will be liable for payment of its share of the project costs incurred up to the issuance of a stop-work or termination notice, and for standby suspension costs, in accordance with the provisions of the suspension and termination grant articles.

QUESTION NO. 7

What standard clauses should be included in grant agreements to protect EPA in all of the above instances?

ANSWER

Published grant regulations contain suspension, termination, grant amendment, and project change provisions which provide an adequate mechanism for most post-award NEPA problems. In cases where exceptional circumstances require award of a grant prior to completion of NEPA review a special condition must be inserted in the grant agreement, with the assistance of EPA Regional Counsel, to assure compliance with NEPA prior to performance of any further project work or incurrence of additional obligations other than standby costs. Suggested language for such a special condition is as follows:

> "This grant is subject to completion of a review required by the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. The grantee hereby agrees to furnish information and otherwise cooperate with EPA regional office staff in the NEPA evaluation and further agrees that no additional project costs or other obligations will be incurred unless and until the Regional Administrator notifies the grantee and the state in writing that the NEPA review has been satisfactorily completed. The Regional Administrator may annul this grant if he determines as a result of the NEPA review that the project for which this grant has been awarded is environmentally unsound."

In other cases where the Regional Administrator decides to prepare an EIS after an award on the basis of a negative declaration, a similar clause should be inserted through a grant amendment, with the assistance of Regional Counsel, except that the sole remedy should be termination, if prior project costs were incurred in good faith by the grantee.

CONCLUSION

The foregoing discussion should make it abundantly clear that NEPA procedures cannot be thought of as separate or distinct requirements; they must be interwoven with EPA grant award and administration requirements. In fact, considerable benefit can be obtained from interrelating NEPA procedures with the various EPA grant programs. For example, emphasis upon NEPA factors in the development and approval of basin plans should minimize NEPA problems on ensuing construction grants; regional personnel responsible for administration of planning and construction grants should interrelate their respective NEPA and program requirements. Similarly, some problems encountered in the administration of the construction grants program may be best resolved in conjunction with negotiation of the state program grant (for example, ensuring that a state agency will not certify a construction grant project unless an adequate environmental assessment has been prepared). The end result of careful attention on the part of each regional office to the interrelationship between NEPA and each of the EPA grant programs should be better administration of these grant programs, as well as an improvement in compliance with NEPA requirements.

Similarly, and for the same reasons, an effort should be made to coordinate NEPA review with the procedures required by,

(1) The Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4201 et seq., as implemented by OMB Circular A-95 (Rev. February 9, 1971, as revised through transmittal memo No. 2 March 8, 1972);

(2) Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3301 et seq., as amended, as implemented by OMB Circular A-98 (June 5, 1970);

(3) Title VI of The Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., as amended; and

(4) The Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, 42 U.S.C. 4621 et seq., 4651 et seq., and the EPA regulations issued thereunder, 40 CFR, Part 4.

Materials concerning these requirements will be found in the EPA Grants Manual. We understand that the Grants Administration Division will soon propose amendments to the grant regulations which will provide more detailed assistance to applicants and to EPA personnel concerning these interrelated review requirements.

The advice of the Regional Counsel should be obtained prior to the initiation of any action by regional personnel which may result in the amendments, suspension, termination, or annulment of a grant. Our Grants and Procurement Division is available to advise your office and the Grants Administration Division concerning the legal aspects of your respective responsibilities under NEPA in the administration of the EPA grant programs.

§ § § § § § §

TITLE: Applicability of NEPA to "Four Corners Project"

DATE: October 4, 1971

BACKGROUND

Six privately owned fossil-fuel power plants, collectively referred to as the "Four Corners Project," are currently in various stages of planning and development. The six plants include the Four Corners Plant near Farmington, New Mexico, which is presently operating, and the Mojave Plant, which is completed but which is not yet transmitting power, due to start-up problems. Three other plants (Navajo, San Juan and Huntington Canyon) are under construction. The Kaiparowits Plant, the largest plant envisioned for the area, is only in the planning phase.

All the foregoing plants are to be owned by private utilities companies, and all have required, or will require, one or more federal administrative actions in connection with their construction and operation, or in connection with provision for their fuel and water supplies. (For example, the coal-burning plants will obtain coal under leases with Indian tribes, subject to the approval of the Secretary of the Interior, or with the Department of the Interior itself.)

Both the Four Corners and Mojave Plants were substantially completed prior to January 1, 1970, (the effective date of NEPA), and no federal action was taken after that date with respect to either of them. Since the effective date of NEPA, however, Interior and the Corps of Engineers have filed a total of five environmental impact statements, none of which has dealt with all the environmental aspects of any one of the six plants; rather, each has dealt with only one aspect of one of the six plants (e.g., granting a right of way for a coal slurry pipeline across federal lands).

QUESTIONS

1. Does section 102(2)(C) of NEPA require a comprehensive impact statement to be filed with respect to the entire Four Corners Project (that is, all six plants), or at least with respect to all the plants subject to federal administrative action on or after January 1, 1970?

2. Does section 309 of the Clean Air Act impose upon the Administrator an affirmative obligation to evaluate the Four Corners Project as a whole, and to comment on it?

CONCLUSIONS

1. Although it is extremely difficult to predict future developments under section 102(2)(C) of NEPA, it is felt that NEPA will not require an impact statement to be prepared with respect to all six plants.

In addition, it seems clear that NEPA will not be applied retroactively to either the Four Corners or Mojave Plants. Accordingly, even if a federal court were to rule that Interior must file a statement encompassing all future actions with respect to the Four Corners Project, such a statement could accept ex hypothesis the environmental effects of the Four Corners and Mojave Plants.

2. No.

DISCUSSION

1. It is true that there are already judicially imposed restrictions on the freedom of a federal agency to define an activity narrowly for purposes of section 102(2)(C). For example, in the very recent case of Conservation Society v. Texas, 2 ERC 1873 (5th Cir., August 5, 1971) which arose under a similar provision of the Department of Transportation Act of 1966, the court held that the Secretary of Transportation could not give piece-meal consideration to a highway, for purposes of approving construction grants. In that case, the Department of Transportation approved construction grants for three "segments" of a highway in San Antonio. Prior to that time, state and federal officials had considered the highway to be a single project, planned to run through a public park. The taking of parklands, however, gave rise to special legal problems under the Department of Transportation Act; accordingly, the Department of Transportation approved the two "segments" of the highway on each side of the park. The third "segment," it was argued, was the only one subject to the special statutory provision relating to the taking of parklands. The Fifth Circuit rejected the Government's contention. It is clear from the opinion that the court was influenced by the fact that the federal authorities had for a decade viewed the three "segments" as a single project. Moreover, the piecemeal decision-making which the Department of Transportation attempted to justify in this case is an extreme example, and obviously evidenced a contemptuous view of the policy underlying the relevant statute.

It may be, therefore, that Interior will not be permitted to file piecemeal impact statements, as it has in the past. (In fact, its lawyers have informally indicated that its future impact statements will deal with all the environmental issues raised by the construction of one power plant.) It is far from clear, however, that Interior would be required to consider all six power plants as one project for purposes of section 102(1)(C). First, its unwillingness to do so seems far less cynical than the position taken by the Department of Transportation in the Texas case. Second, the six power plants involve different owners, different water and fuel sources, and serve different markets, etc. It is difficult to say that the six plants are in reality one project, as the segmented highway was.

It so happens that the Secretary of the Interior has announced a suspension in the schedule for the development of the Kaiparowits Plant, pending a study of the present and projected power needs in the Southwest. While that fact may help the conservation groups (several of which have already instituted litigation concerning the Four Corners Project) in arguing that Interior views all six plants as a single project, it would hardly dispose of the issue.

The foregoing conclusion would be greatly weakened if it were shown that Interior has in fact historically regarded all six power plants as one project, particularly if the earlier plants were built only on the assumption that construction of the later ones would proceed. But there are no such facts at our disposal at this time.

Finally, it should be noted that the recent case of Calvert Cliffs Coordinating Committee v. AEC (No. 24, 839, D.C. Cir., July 23, 1971) does not alter the above conclusion concerning the non-retroactive applicability of NEPA. Calvert Cliffs held that the AEC must apply NEPA to proceedings involving nuclear power plants, even in cases where construction permits had been granted prior to the effective date of the Act. The court expressly noted that decisions holding NEPA not to be retroactive had not faced situations involving two distinct stages of federal approval. Id. at 39 n. 43 (slip opinion). Accordingly, Calvert Cliffs would only be helpful to a plaintiff arguing that Interior must file an impact statement with respect to a whole plant, where only one of several federal actions remained to be taken after January 1, 1970. But it does not alter the above conclusion concerning the applicability of NEPA to the Four Corners and Mojave Plants, unless the conclusion concerning the scope of the "Project" is erroneous.

2. Section 309 of the Clean Air Act appears to impose duties on the Administrator with respect to the Four Corners Project only to the extent that a statement is required under section 102(2)(C). It is true that section 309 is not precisely congruent with section 102(2)(C). The former calls for review and comment by the Administrator on three enumerated classes of federal activities, if they have an environmental impact on any matter relating to his statutory duties. Proposed legislation and regulations constitute two of the three classes of federal activity set forth in section 309. The third is "newly authorized federal projects for construction and any major federal agency action (other than a project for construction) to which section 102(2)(C) of [NEPA] applies. . . ." Since nothing in the Four Corners Project constitutes a federal construction project, the Administrator's responsibility under section 309 of the Clean Air Act appears to be congruent with Interior's responsibility under section 102(2)(C), as far as the Four Corners Project is concerned.

§ § § § § § §

TITLE: Four Corners -- application of NEPA to Interior's review of air pollution control equipment

DATE: December 21, 1971

The Secretary of the Interior, under various agreements with the Indian tribes and the power companies, has authority to review the installation of air pollution control equipment at the Four Corners Generating Station. Interior expects to review proposed plans for such equipment to be submitted by the company, and has asked our "concurrence in waiving the preparation of an environmental statement on this review." Interior points out that the delay incident to preparation of an environmental statement "would allow the continued use of the less efficient equipment."

We have drafted the attached response for your signature, stating that while our air pollution control staff is ready to review the proposals and indeed is presently doing so, we have no legal power to wave the requirements of NEPA.

Before you sign this letter, however, you should be aware that an alternative response is possible, although I do not recommend it. Section 5(b) of the CEQ Guidelines under NEPA states that "environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements." Under this language, we could take the position that Interior would not have to comply with NEPA if EPA concurred in their approval of the proposed equipment.

I recommend that we not adopt this approach, for two reasons. First, it would involve considerable legal risk. At the present time, our position that permits under the Refuse Act do not require environmental impact statements is being challenged in two suits. In those cases, in order to buttress our position that "environmental protective regulatory activities" do not require compliance with NEPA, we have argued that the permit program establishes a formal procedure in which the public has a chance to participate, and public airing of environmental issues is thus guaranteed. I would not want to see the question tested in the context proposed here, where EPA review would be entirely *ex parte*, without any public airing of the environmental issues. This would be especially unfortunate in view of the public controversy which surrounds the Four Corners plant.

Secondly, I think that informal EPA review of other agencies' activities, as a basis for avoiding NEPA, would be an unfortunate precedent. It seems to me that if other agencies are going to make it a practice to obtain EPA concurrence for their environmental regulatory activities, they should make to us a fairly complete presentation. And if such a presentation is to be made, it might as well be done in the form of a draft environmental impact statement.

I recognize, of course, that the response I recommend to Interior's request may involve delay in the installation of control equipment at Four Corners. However, I think the problems involved in the request are such that we should not comply with it.

§ § § § § § §

TITLE: Air Pollution Control Equipment -- Four Corners Generating Station

DATE: December 27, 1971

Dr. William T. Pecora
Under Secretary
U.S. Department of the Interior
Washington, D.C. 20240

Dear Dr. Pecora:

I have your letter of November 5, concerning the Department of the Interior's review of plans for the installation of air pollution control equipment at units 4 and 5 of the Four Corners Generating Station.

Our air pollution control experts would be pleased to provide any assistance we can in your review of proposals for pollution control equipment. Our staff have recently received the plans referred to in your letter, and are presently analyzing whether the plans are likely to result in the reduction of emissions proposed by the Department of the Interior.

EPA is unable, however, to wave any possible legal requirement that the Department of the Interior prepare an environmental impact statement. Each Federal agency proposing to take a major action is responsible for determining whether a statement is required; if one is required, EPA is not empowered to grant an exemption.

Under the National Environmental Policy Act, a public disclosure of environmental issues is an essential purpose of the environmental impact statement procedure. Where the Act requires that procedure, EPA is not in a position to substitute its own review of the environmental issues for the public review which the Act contemplates. The decision of the Court of Appeals in the Calvert Cliffs case demonstrates that where a NEPA review is required in connection with federal agency action, the agency may not delegate its duty to conduct such a review to a regulatory agency such as EPA.

Sincerely yours,

Donald Mosiman
Assistant Administrator
For Air and Water Programs

§ § § § § § §

ENVIRONMENTAL IMPACT STATEMENTS

TITLE: CEQ's Guidelines for Preparation of Environmental Impact Statements

DATE: November 30, 1971

FACTS

Section 5(d) of CEQ's April 23, 1971, Guidelines issued under section 102(2)(C) of the National Environmental Policy Act conclude that "environmental protective regulatory activities" taken by EPA, or taken with its approval, are not the sort of federal actions which require impact statements.

QUESTIONS PRESENTED

1. What is an "environmental protective regulatory activity?"

2. Do the registration of economic poisons under section 4(a) of FIFRA and the issuance of temporary permits under 7 CFR §2762.17 constitute such activities?

ANSWER

1. There is no clear-cut definition of "environmental protective regulatory activity," as the discussion below indicates. There are, however, several criteria to which EPA should look in deciding on an ad hoc basis which of its activities fall within the scope of the exception contained in the Guidelines.

2. No.

DISCUSSION

1. There is nothing in NEPA, in its legislative history, or in the CEQ Guidelines to illuminate the question of what is an "environmental protective regulatory activity." The most pertinent comment from the legislative history of NEPA appears in a document published at page S 17453 of the Congressional Record for December 20, 1969:

> "Many existing agencies such as the National Park Service, the Federal Water Pollution Control Administration and the National Air Pollution Control Administration already have important responsibilities in the area of environmental control. The provisions of section 102 (as well as 103) are not designed to result in any change in the manner in which they carry out their environmental protection authority."

Given such a cryptic expression of intent, the phrase in question will be defined in large measure by administrative practice in the coming months. I believe there are four considerations to which we should look in deciding whether or not an EPA activity falls within the scope of the "exemption":

a. The "exemption" is not contained in the statute, but must be inferred, if it exists at all, only from a sparse legislative history (albeit one reinforced by CEQ's own reading of NEPA). The exemption should therefore be read narrowly, for at least two reasons. First, failure to file an impact statement may result in embarrassment to the Agency. Second -- and of more substantive concern -- is the possibility of an injunction against the implementation of an EPA decision, as a result of a law suit brought by polluters who have borrowed a page from the book of the conservationists.

b. On the other hand, there will be situations, as noted below, in which the requirements of NEPA would impose an intolerable administrative burden on the Agency. Admittedly, that fact alone does not govern the meaning of a statute, but I think it is entirely proper to take it into account, in view of the fact that we will, for all practical purposes, be making new law.

c. In any case in which it is tentatively decided to forego the NEPA process on the grounds that we are about to engage in an "environmental protective regulatory activity," careful thought should be given to the question of what our position would be if some other agency had made an analagous decision with respect to its own activities. You will note that the above-quoted excerpt from the legislative history does not specify precisely which agencies have the sort of responsibilities which the Senate had in mind. While EPA was clearly included to the extent its activities follow in the footsteps of those of NAPCA and FWPCA, it is not clear that the exemption applies to all of the EPA activities included in Reorganization Plan No. 3 of 1970. Accordingly, we should be wary of claiming an exemption for our own purposes, and then having our arguments thrown back in ourcollective face by some other, less environmentally conscious agency.

d. We have a strong argument that we are operating under cover of the exemption to the extent environmental concerns are built into EPA's decision-making process with respect to the activity in question.

2. Applying the foregoing considerations to the questions you have raised under FIFRA, I conclude that neither the registrations of pesticides under section 4a, nor the issuance of temporary permits for the experimental use of such pesticides should be subject to the NEPA process. In the first place, it is difficult to conclude that these two activities should be treated differently. We could probably argue for different treatment, if we so desired, on the grounds that a registration of a pesticide represents regulatory activity, while the granting of a temporary permit merely involves waiving the regulatory authority we have under FIFRA. But in view of the fact that both activities have the result of permitting the regulated interests to transport pesticides over state lines, subject to regulatory restrictions, I conclude that their treatment under NEPA should be the same.

Second, and in spite of the desirability of construing the exemption narrowly, I think that the task of filing some 12,000 environmental impact statements every year would be an intolerable administrative burden.

Third, I am unaware of any comparable program of another federal agency with respect to which we have claimed, or wish to claim, that 12,000 impact statements should be prepared annually.

Finally, the consideration inherent in the decision to register a pesticide, and in the decision to grant a temporary permit for experimental use (as described in the undated memorandum from William M. Hoffman to Douglas Lobell, a copy of which you have provided us) both entailed the sort of balancing process which NEPA attempts to ensure.

§ § § § § § §

TITLE: Comments on Draft Environmental Impact Statements -- Legal Consequences of Request for Additional Information

DATE: January 18, 1972

A draft letter from EPA trasmitting comments on the draft EIS for the Oconee Nuclear Station contains a paragraph requesting additional information. This paragraph raises certain legal problems which I have discussed with you over the telephone. Since the problems involved are likely to be recurring, I thought it best to summarize my thoughts in writing.

The paragraph in the draft letter with which I am concerned reads as follows:

> We appreciate the opportunity to review the information so designated before the final impact statement is filed with the Council on Environmental Quality. This information and the remaining requested data, wherever possible, should be included in the final statement. We recognize, however, that some of the data may not be currently available and will take some time to develop. In such cases, a definite commitment to provide the information, supported by a timetable, should be made.

This paragraph raises two separate problems.

1. The first sentence in the paragraph requests an opportunity to review additional information before the final impact statement is filed with CEQ. As a legal matter, I do not think we should make this request. The request assumes that the information necessary in order to make an adequate environmental evaluation must be available before the final impact statement is filed. This is inconsistent with NEPA and the CEQ guidelines, under which the final impact statement is the vehicle for setting forth all the information required for an environmental evaluation.

Moreover, if EPA is entitled to have additional information before the final impact statement is filed, it is very easy to conclude that this additional information should be made available to the public and all interested parties, by means of an additional draft environmental impact statement. After all, neither NEPA nor the CEQ guidelines contemplate that EPA is in any special position from the standpoint of obtaining information from the lead agency-- and I do not think we should ask for any such special position. Any information that EPA needs in order to make a complete environment assessment should also be made available to any other group that wants to make such an assessment. This means that the information ought to be in either the draft or the final statement, which are publicly circulated documents. Thus, if we take the position that the information be made available before the final impact statement is filed, we would have to support the argument that the additional information should be in the draft statement.

Environmental groups are now starting to make the argument that draft environmental statements--as well as final statements--must meet certain standards of adequacy and completeness. The argument, if accepted, could have important practical consequences. For instance, it might mean that in many cases several draft statements would have to be circulated before the final statement is filed, so that the lead agency is certain that its final draft statement meets all legal standards. I do not think we should support this position, since it would make NEPA procedures unduly cumbersome. I think that the request in our Oconee Letter for additional information before the filing of the final statement does support the environmentalist position in this respect, and for this reason I think it should be stricken.

2. The Ocones letter also suggests that certain information required for an environmental evaluation might be supplied after the final impact statement is filed with CEQ, according to a definite time table. I have no legal objection to this sentence, but I think you should realize that it does increase the probability that the final statement for the Oconee Nuclear Station will be held to be inadequate. In the Tennessee-Tombigbee Waterway case, the plaintiffs are attacking an environmental statement which left some of the environmental questions open for further study. Basically, the plaintiffs there are contending that the Corps must complete its environmental studies before filing the final statement, so that an environmental evaluation can be completed before the project is started. The district judge apparently accepted this position since he has granted a temporary injunction against the Tennessee-Tombigbee project.

Of course, if the information presented by AEC is inadequate, we must point this out, even though the necessary data may not be obtainable before the AEC wishes to file its final impact statement. However, you must realize that a commitment by the AEC to supply the additional information at a later date will not necessarily protect the AEC from the duty of defending its final EIS against the charge that it is inadequate.

§ § § § § § §

TITLE: Necessity of Environmental Impact Statement when Issuing a Discharge Permit to a "New Source"

DATE: September 28, 1973

You have asked, in effect, whether a State which is operating an NPDES permit program approved by the Administrator under Section 402 of the FWPCA Amendments of 1972 (the Act), must prepare an environmental impact statement when issuing a discharge permit to a "New Source."

The answer is no.

Section 102 of the National Environmental Policy Act of 1969 (NEPA) provides, in part, that environmental impact statements are to be prepared by "all agencies of the Federal Government" on "major Federal actions significantly affecting the quality of the human environment."

Thus, by its terms, NEPA applies only to federal agencies and imposes no duties upon the States. See, e.g., Ely v. Velde (4th Cir. 1971) 451 F 2d 1130; Miltenberger v. Chesapeake and Ohio Railroad (4th Cir. 1971) 400 F 2d 271.

Section 402 was apparently deliberately drafted to avoid an inference that the States were receiving a delegation of federal permit issuance authority, thereby arguably subjecting them to other federal laws, including NEPA. The House Report declares that "permits granted by States under section 402 are not Federal permits -- but State permits." (H. Rep. 92-911, 92nd Cong., 2nd Sess., 121). Rep. Wright, a conferee stated:

> In the event [EPA approval of the State permit program], the States, under State law, could issue State discharge permits. These would be State, not Federal, actions, and thus, whether for existing or new sources under section 306, such permits would not require environmental impact statements.
> (Cong. Rec. daily ed., Oct. 4, 1972, at H 9129).

Moreover, I cannot agree with the statement in your memorandum that EPA retention of veto power, pursuant to section 402(c), over State issued permits constitutes federal action requiring an environmental impact statement.

Section 511(c) of the Act creates a limited exception to the rule under which the Agency is presently operating; that the requirements of NEPA, at least insofar as impact statements are concerned, do not apply to its regulatory program.[1]

This section, while expressly exempting most of the Agency's actions under the Act from the purview of NEPA, extends the obligation to prepare impact statements to certain actions of the Administrator, namely: (1) issuance of a permit under section 402; and (2) provision of Federal financial assistance for the construction of publicly owned treatment works authorized by section 201. Issuance of a permit by a State is not an " ction of the Administrator" and hence is not covered by section 511(c) anymore than is State provisions of financial support to a municipally owned treatment works. Similarly, a decision by the Administrator not to veto a State issued permit is not "issuance of a permit" and is equally outside the scope of section 511(c).

---

[1] The Agency's position has been upheld by the Third, Fourth, Sixth, Tenth and D. C. Circuits.

NEPA -- SUMMARY OF MAJOR DECISIONS

TITLE: Summary of Major Decisions

DATE: February 14, 1972

The National Environmental Policy Act requires every Federal agency in connection with "major actions significantly affecting the quality of the human environment", to prepare environmental impact statements. Prior to preparing the statement, the agency must obtain comments of any Federal agency "which has jurisdiction by law or special expertise with respect to any environmental impact involved." The statement is required to "accompany the proposal through the existing agency review processes."

Calvert Cliffs Coordinating Committee v. AEC held that the AEC, in discharging its responsibilities under NEPA with respect to water quality considerations, could not rely on a state certification that a proposed nuclear power plant would comply with water quality standards. While water quality standards would serve as the minimum, the AEC was nevertheless obligated to independently reconsider water quality factors to determine whether higher requirements should be imposed in light of the over-all cost benefit balance of the particular plant.

Calvert Cliffs also rejected the AEC's contention that its consideration of environmental issues under NEPA could be confined to points that were raised and disputed by the parties. It is this holding which raises the possibility that NEPA will become impossibly cumbersome, since it means that an agency must consider all possible, relevant environmental issues in every case, rather than confining itself to issues raised by the parties in contested cases -- which would be a much more manageable task.

A second major decision is the Greene County Planning Board v. FPC. There the Second Circuit held that the FPC must prepare an environmental impact statement before its hearing examiner holds a hearing on the merits of a project. The prior practice of the FPC had been to append an environmental impact statement to its final opinion. The Second Circuit relied on the language in NEPA requiring a statement "to accompany the proposal through the existing agency review processess." The hearing before the examiner, in the Second Circuit's view, is part of the "existing agency review processess."

The Greene County decision emphasizes the need for preparing the environmental impact statement at an early stage of the planning for a project, however, is that the environmental impacts of a particular project may not be known or fully investigated while the proposal is at an early stage. Indeed, as a proposal is being reviewed, it seems likely that there will be considerable investigation of its environmental impacts. Thus, for example, an FPC hearing is likely to produce considerable information on environmental impacts -- information which may make an earlier filed environmental impact statement look inadequate. Thus agencies are now faced with the problem of preparing their statements early enough in their review process to satisfy Green County, but late enough so that all the important environmental impact information can be developed for inclusion in the statement.

There have been several key decisions on the contents of environmental impact statements. In Natural Resources Defense Council v. Morton, the Court of Appeals for the District of Columbia Circuit recently held up the leases for off-shore drilling on the ground that the statement did not adequately consider all sources of oil supply. Specifically, the statement did not consider abolition of the oil import quota system or the easing of the quotas. The court rejected Interior's contention that it did not have to consider alternatives which are beyond its power to effectuate. The court pointed out the environmental impact statements are designed not only for the particular agency taking the action, but also for the President, the Congress, and the general public; therefore, alternatives which could be effectuated by legislation should be discussed.

Committee for Nuclear Responsibility v. Seaborg (the Amchitka case), also considered the contents of environmental impact statements. That case held that a statement should mention and discuss all responsible conflicting views on the environmental impact of a project, even where the agency disagrees with some of the views. In other words, the statement should not simply be a brief for the project, but instead it should set forth the full range of responsible opinion concerning the impact of the project.

A significant pending case is Sierra Club v. Sargent, in the Federal district court in Seattle. There the Sierra Club is challenging a permit issued to an Arco refinery on the ground of failure to file an environmental impact statement. One contention being made is that, even if no statement is required for water quality considerations, there should still be a statement with regard to the impact of the new refinery on the character of the area, including the probability that it will attract future industry and create an industrial complex where none previously existed. The implication of this contention is best understood in light of the Fifth Circuit's decision in Zabel v. Tabb. There it was held that, under NEPA, the Corps of Engineers was empowered to deny a dredge and fill permit on environmental grounds, despite an absence of effect on anchorage or navigation. In other words, NEPA not only is a requirement to discuss environmental issues; it is also a grant of power to act on the basis of environmental consideration. (This is also implicit in the Calvert Cliffs decision, which rules that the AEC may stop construction or operation of nuclear power plants on the basis of environmental consideration.)

In short, if the plaintiffs in Sierra Club v. Sargent are right, then EPA will be empowered to deny or condition discharge permits on the basis of the general environmental impact of the plant, including its impact on land use in the area and possibly also the impact of the product which it manufactures. This would mean a very broad grant of power to EPA (or to any other federal agency which issues licenses required by businesses). It would put EPA in the position of an industrial zoning board, and also require it to assess the general economic and environmental utility of new manufacturing plants in order to balance the environmental and costs. This raises the question of whether NEPA was intended to grant such broad powers to any federal agency. If not, there will have to be some limitation placed on the scope of environmental impacts that the licensing agency must consider. However, so far the courts have tended to expand, rather than contract, the scope of the NEPA process.

$ $ $ $ $ $ $

TITLE: Calvert Cliffs Decision

DATE: August 4, 1971

In its decision involving the Calvert Cliffs nuclear plant, the Court of Appeals for the District of Columbia Circuit has required the AEC to conduct proceedings evaluating the environmental impact of nuclear power plants presently under construction. Calvert Cliffs Coordinating Committee, et al. v. AEC, et al., (D.C. Circuit Nos. 24839, 24871, July 23, 1971). The Administrator asked Mr. Eardley for advice on what position EPA should take with respect to the AEC proceedings that will be held pursuant to the Calvert Cliffs decision.

In the Calvert Cliffs case, a citizens' group challenged the granting of a construction permit for the Calvert Cliffs nuclear plant on several grounds. One ground was the AEC's refusal to consider the environmental impact of the plant. The AEC took the position that where water quality certifications had been provided under section 21(b) of the FWPAC, no further environmental consideration was required on the AEC's part. The Court of Appeals disagreed, holding that the National Environmental Policy Act required the AEC to engage in an independent review of environmental factors as they relate to construction and operation of the plant. The Court of Appeals stated:

> As to water quality, section 104 [of NEPA] and [Section 21(b) of FWPCA] clearly require obedience to standards set by other agencies. But obedience does not imply total abdication. * * * [Section 21(b)] does not preclude the Commission from demanding water pollution controls from its licensees which are more strict than those demanded by the applicable water quality standards of the certifying agency. * * *
>
> * * * Water quality certifications essentially establish a minimum condition for the granting of a license. But that need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage. [Slip opinion 29-31] (Emphasis in original).

Under this opinion, AEC must respect water quality standards, and there is nothing in the opinion permitting the AEC to scond-guess EPA as to what the standards are and what they require. However, the opinions clearly precludes AEC from delegating to EPA or any other agency its obligation under NEPA to consider whether protective measures in addition to those called for by water quality standards must be required.

Accordingly, when the AEC holds its "environmental impact" proceedings pursuant to Calvert Cliffs, EPA must continue with whatever administrative or judicial proceedings it may be engaged in at the time with respect to the power plants involved, since it is EPA's proceedings which will set the minimum level below which AEC must not permit its licensee to fall. However, under Calvert Cliffs, we cannot dictate to the AEC whether or not it should take additional protective measures beyond what water quality standards require. Accordingly, all we can do in connection with the AEC proceedings themselves is to intervene and present our views whenever the particular circumstances of the case make such intervention advisable.

§ § § § § § §

TITLE: Environmental Impact of Nuclear Power Plants -- Relationship between AEC and EPA

DATE:

A recent decision of the Court of Appeals for the District of Columbia Circuit requires the Atomic Energy Commission to consider the environmental impact of any nuclear power plant in connection with the granting of construction and operating licenses. The AEC's position had been that in any case where water quality certifications had been obtained from either State agencies or EPA pursuant to Section 21(b) of the Federal Water Pollution Control Act, there are no need for further environmental consideration by the AEC. The Court of Appeals rejected that position, holding that AEC had an independent obligation under the National Environmental Policy Act to consider the environmental impact of the licenses it grants. Calvert Cliffs Coordinating Committee, et al. (D.C. Cir. 24839, 24871, decided July 23, 1971).

The Calvert Cliffs decision raises an immediate problem with respect to the nuclear power plants under construction on Lake Michigan.

Calvert Cliffs holds that AEC is obligated to conduct proceedings in cases of plants now under construction, to determine whether additional requirements should be imposed during construction to alleviate environmental effects. As you know, we are presently involved in litigation challenging the thermal standards adopted for Lake Michigan by the Lake Michigan enforcement conference. The question presented is what position EPA should take with respect to AEC proceedings on the environmental impact of the nuclear power plants on Lake Michigan.

As we read the Calvert Cliffs decision, the AEC must consider whether it should require nuclear power plants to take protective measures in addition to what water quality standards require. However, the decision does not authorize AEC to relax water quality standards. Thus, for example, if water quality standards specify that there shall be no thermal discharges except those required for blowdown, AEC could require that there be no thermal discharges at all, but could not allow thermal discharges exceeding those required for blowdown.

Accordingly, I believe that the following three points should define our position:

1. The AEC must at a minimum require its licensees to comply with either water quality standards or enforcement conference recommendations, and in this connection it must respect EPA's jurisdiction to establish the standards and/or make the enforcement conference recommendations.

2. As noted, EPA water quality standards and/or enforcement conference recommendations establish a minimum below which the AEC licensees cannot go. Accordingly, where administrative or judicial proceedings in connection with standards or enforcement conference recommendations are pending, these proceedings will not be held up pending the outcome of the AEC proceedings. Indeed, if there is to be any delay, it should be in the AEC proceedings, since until the EPA proceedings are completed, the AEC does not know what minimum level has been set for it.

3. Where an AEC proceeding is in progress, EPA will be permitted to intervene. In the course of AEC proceedings, EPA's advice with respect to what water quality standards and/or enforcement conference recommendations require will be conclusive on the AEC. But, as the Calvert Cliffs decision establishes, AEC may impose additional requirements under the National Environmental Policy Act. As to any such proposed additional requirements, EPA's advice will be given serious consideration.

RELEASE OF INFORMATION

TITLE: Release of information in Regional Office files

DATE: August 5, 1971

In your memorandum of July 8, 1971, you asked generally what information in the Regional files concerning individual dischargers must be released, what must not be released, and what is within your discretion under the law to release or withhold. Your inquiry had particular reference to requests for information from the Businessmen for the Public Interest, a conservationist group with which we are currently engaged in litigation over the permit program.

With respect to the request for information made by Businessmen for the Public Interest, you were correct in referring all inquiries which might in any way relate to the permit program to me. I will in turn have to refer to the Department of Justice any inquiries which that group may make to me. As a general rule, whenever a person or organization with which we are in litigation requests information, you should refer the request to this office or directly to the United States Attorney, so long as the information requested has some possible relevance to the lawsuit. The Justice Department simply cannot represent us adequately in court unless they are aware of, and can monitor the release of information to the opposing party.

Assuming that the request comes from a person or organization with which we are not in litigation, the following ground rules may be followed:

1) Any information which has been accorded confidential treatment under the procedures specified in permit program regulations must not be disclosed to a member of the public. In addition, public disclosure must not be made in violation of 18 U.S.C. 1905. That statute prohibits public disclosure, "to any extent not authorized by law," of "trade secrets, processes, operations, style of work, or apparatus," as well as the "identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." However, an opinion of the Attorney General, 41 Op. Atty Gen. 166, states that a disclosure is "authorized by law" within the meaning of 18 U.S.C. 1905 if it is necessary or proper in the discharge of the agency's functions, even though there is no statute specifically authorizing disclosure. In my opinion, a disclosure of information of the type specified in 18 U.S.C. 1905 to an organization that wished to utilize the information to participate in permit program hearings would be necessary or proper in the discharge of this Agency's duties under the permit program regulations, and thus would not be prohibited by 18 U.S.C. 1905, as interpreted by the Attorney General. This, of course, does not authorize you to disclose any information that has been accorded confidentiality under the provisions of the permit program regulations.

2) The question of what information you may withhold under the law is governed by the exemptions to the Freedom of Information Act, 5 U.S.C. 552. There are two exemptions which describe information in your files that may be withheld under the law, but which we are not required to withhold. These are the exemptions for investigatory files (5 U.S.C. 552 (b)(7)) and the exemption for internal communications (5 U.S.C. 552(b)(5)).

The exemption for investigatory files would include the first five items in the list set forth in your July 8 memorandum. However, this exemption would apply only so long as EPA is actively considering enforcement action against the discharger in question. If the file is kept open only to monitor results or to keep track of compliance with a schedule, it would probably not be considered an investigatory file for purposes of the exemption. Moreover, any material in the file which constitutes a public document must be released, even though it is part of an investigatory file. Thus any material designated by the permit program regulations as being available for public inspection, as well as items 6 and 7 in your July 8 memorandum, would have to be disclosed even though it is part of an investigatory file.

The Freedom of Information Act also exempts "interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency". (5 U.S.C. 552(b)(5)). This exemption has been interpreted to cover only communications within the Federal government which contain policy advice and recommendations. On this basis, communications which discuss enforcement strategy and tactics, may be withheld. But factual memoranda or letters would not be within the exemption, although they may fall within the investigatory files exemption, depending on the circumstances.

3) If a single file contains material which must be released together with material that must not be released or which you determine you will not release, it will be necessary to separate the file or to make copies of the material to be released.

4) I would emphasize that the general policy of this agency is to be as open as possible in its disclosure of information to the public. Accordingly, material need not be withheld from public disclosures simply because the Freedom of Information Act would permit us to withhold it. Generally speaking, apart from the information that must under the law be withheld (see paragraph 1, supra), you should not withhold information from public disclosure--even when the law permits you to do so--unless you determine that public disclosure would severely hamper your operations.

5) We expect shortly to publish regulations covering the procedures for requesting disclosure of documents from this agency under the Freedom of Information Act. These regulations should be of some help to you in handling requests from the public for information.

§ § § § § § §

TITLE: Requests for Information from Members of Congress

DATE: December 19, 1972

Alan Kirk has advised me that you and the Administrator questioned an oral opinion of his to the effect that the exemptions contained in the Freedom of Information Act do not apply to requests from a member of Congress. Alan has asked for my considered opinion on the correctness of his views.

I think it is clear that the exemptions in the Freedom of Information Act, 5 U.S.C. §552(b), do not apply to congressional requests. This is so because subsection 552(c) provides in pertinent part:

> "This section [5 U.S.C. §552] is not authority to withhold information from Congress."

That is not to say, however, that there are no restraints on the legal power of a Congressman to extract information from the executive branch. There appears to be two:

1. When a Congressman writes a letter to an official of the executive branch requesting information, his letter may not be legally sufficient to invoke the full powers of Congress to demand information from the executive. Mink v. EPA, 1 ELR 20527 (Oct. 15, 1971), necessarily means that the exemptions listed in 5 U.S.C. §552(b) are indeed applicable to a congressional request if it was made under the Freedom of Information Act, and if the Congressman thereafter brings suit under that Act. In other words, if a Congressman wishes to resort to the Freedom of Information Act, he has no greater rights than a private citizen. As a corollary, if a Congressman wishes to assert his congressional prerogatives to receive information from the executive branch, he cannot bring a lawsuit under the Freedom of Information Act, or under any other statute of which I am aware. (It is the position of the Justice Department, as I understand it, that a request is from the Congress within the meaning of the saving clause in the Freedom of Information Act, only if it comes from a committee or subcommittee chairman. Frankly, I do not understand the basis of this position, which seems to derive from custom and usage. The legal sufficiency of a particular request from Congress has never been litigated.)

2. Assuming that a particular request from Congress is legally sufficient to assert all available congressional prerogatives to receive information from the executive branch, the information may be denied only on grounds of "executive privilege." Executive privilege may be asserted with respect to any document internal to the executive branch, although no court has yet reviewed the precise scope of the privilege in connection with a congressional request. In any event, President Nixon's memorandum of March 24, 1969 (a copy of which John Dean's office is sending me), provides that executive privilege may be claimed in response to a congressional request only with the personal approval of the President.

§ § § § § § §

TECHNICAL INFORMATION

TITLE: Status of Technical Information Provided EPA by Private Companies

DATE: January 29, 1973

I. BACKGROUND

I have been informed by Alan Kirk that your office has requested, through Lee Attaway, advice on when to accord confidentiality to technical information generated by a private party, particularly when furnished EPA pursuant to a grant or contract. I understand that there have been several cases in which R & M personnel have refused to turn such information over to EPA's own enforcement personnel. I am assuming, however, that the guidance requested would be applicable to requests under the Freedom of Information Act, 5 U.S.C. §552, from members of the public as well.

II. GENERAL

It is extremely difficult for me to imagine a situation in which EPA would be legally entitled to withhold the sort of data in question from any member of the public who request it. As you probably know, the Freedom of Information Act establishes the general rule that all documents in the possession of the government are available on request to any member of the public, irrespective of his need for the information. There are, to be sure, several exceptions to the general rule just stated, although only one of them would normally be of any relevance to the data in question -- namely, the exemption in section 552(b)(4) for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

EPA has promulgated regulations establishing procedures for making determinations as to the applicability of the language just quoted. 40 CFR §2.107a, effective June 12, 1972. You will note that that regulation distinguishes between "trade secrets" and other information which may fall within the scope of the exemption.

(a) Trade Secrets. The law of trade secrecy is extremely complex, and its greatest complexity lies in the definition of "trade secret". Be that as it may, a good rule of thumb to follow is that a trade secret must meet three criteria:

(1) It must be secret, in that the company owning it must reveal it only to employees having a need to know it, or to persons outside the company only in circumstances constituting "privileged disclosures" (i.e., attorneys, potential customers, etc.).

(2) It must be of commercial advantage to one who knows the secret.

(3) It must not be generally known in the industry.

As the foregoing indicates, "trade secret" is a fairly limited concept, and a company's claim that has one should not be lightly accepted. In any event, the attached regulation provides for procedures whereby this office will issue a legal determination as to whether or not information requested by a member of the public in fact constitutes the trade secrets of any other person.

(b) Other "Confidential" Information. When we undertook the task of writing EPA regulations for the implementation of the Freedom of Information Act we discovered that there was very little useful precedent as to what "confidential" commercial information, other than trade secrets, Congress intended to cover with the exemption in section 552(b)(4). We have attempted to respond to that lack by defining such "confidential" information very narrowly, in conformity with the Administrator's expressed desire to pursue a generally liberal policy with respect to the Freedom of Information Act.

By drafting the attached regulation as we did, we probably waived some latitude that EPA may have had under the statutory provision. 40 CFR §2.107a(b) provides, in effect, that there is no such thing as "privileged" or "confidential" commercial information in this agency's files, unless it was received from a third party pursuant to an advance written undertaking to keep it confidential; moreover, no agency employee is authorized to enter into such an undertaking unless the agency has no available legal means of compelling disclosure of the information involved. Thus, for example, non trade secret data which must be submitted to the agency in connection with an application for certification under Title II of the Clean Air Act can never be subject to such an agreement. On the other hand, data in a technical proposal submitted pursuant to an RFP can be subject to such an agreement, since the party submitting the data does so voluntarily.

III. DATA RECEIVED UNDER GRANTS AND CONTRACTS

If it is generally difficult to withhold from the public technical data in our files, it is doubly difficult to do so when that information has been provided to us pursuant to a contract or grant paid for out of public funds. A trade secret must either be a patentable device or a compendium of information that satisfies the criteria listed in paragraph II(a), above. If it is patentable, and is developed, say, in the course of some sort of demonstration grant, it would be subject to the provisions set forth in Appendix B to Subchapter B, Title 40, CFR. Although individual grant instruments may provide otherwise, the general rule is that all right and title to patentable developments arising from a federal grant become government property.

Trade secrets which are not patentable devices, and other information which is not trade secrets, would be subject to disclosure at the government's discretion pursuant to Appendix C of Part 45. The Environmental Protection Procurement Regulations in Title 41, CFR, contain analogous principles.

Thus, although certain grants and contracts may from time to time include special provisions on confidentiality, information provided EPA pursuant to a grant or contract will usually be subject to mandatory public disclosure under applicable regulations.

IV. EPA EMPLOYEES

It should be unnecessary to state that agency personnel, e.g., enforcement, officials, acting within the scope of their duties have rights at least as great as members of the general public to technical data in EPA files.

R&M personnel should be aware of the foregoing principles since it would be highly embarrassing to the agency to be forced to renege on a verbal pledge of confidentiality extended by scientific personnel not familiar with our regulations. I would therefore suggest that Alan Kirk and Bob McManus meet with your key assistants to expand on the above and to try to answer any questions.

§ § § § § § §

AUDIT REPORTS

TITLE: Public Availability of Audit Reports

DATE: July 25, 1973

I have your memorandum of July 11, 1973, requesting my views on the Freedom of Information ramifications of draft EPA Order 2750.1A. Specifically, you have asked whether audit reports are public documents, and if so, at what point they become such.

As I understand section 4 of the draft, there are six kinds of "reports of audits". Each of those six categories may be further subcategorized as "draft reports", "action reports" and "final reports".

The Freedom of Information Act provides that all "identifiable agency records" must be made available to the public on request, unless they fall within one of the nine exemptions. Exemption No. 8 deals with audit reports prepared by or on behalf of "an agency responsible for the regulation or supervision of financial institutions." By inference, then, Congress consciously decided not to differentiate EPA's audit reports from other agency records.

The "reports of irregular conduct" described in section 4.a(6) of the draft order are probably entitled to Exemption No. 7 ("investigatory files compiled for law enforcement purposes. . ."). Beyond that, it seems to me that any decision to refuse a public request for an audit report must be based on Exemption No. 5. Roughly speaking, this exemption covers those portions of internal memoranda consisting of policy advice and recommendations, as opposed to "facts".

Although Exemption No. 5 is probably the most frequently invoked exemption, it is surely the most confusing, and the Agency is presently involved in several lawsuits concerning its scope. For the time being, we are willing to argue that draft document--notwithstanding they may consist wholly or partly of "facts"--actually represent the author's recommendations to higher authority. On this basis, therefore, we would argue that "draft reports" may be withheld. "Action reports", on the other hand, are defined in the draft order as "factually-correct positions of the Office of Audit. . . ." Although EPA may withhold those portions of action reports which contain recommendations, it is my opinion that their factual portions would have to be disclosed on request. For purposes of FOIA, "final reports" would be regarded no differently than "action reports".

In sum, it is my opinion that the agency may elect to withhold

(1) reports of irregular conduct;

(2) draft reports;

(3) non-factual portions of action reports and final reports.

It should be noted that FOIA does not prohibit the release of documents; it merely exempts certain documents from mandatory public disclosure if the agency chooses to invoke an exemption.

Section 10 of the draft order should be revised in light of the foregoing.

Finally, I have two editorial comments:

(1) "Exit conference" should be defined.

(2) The references to "factually-correct" are unfortunate, in that they suggest there are documents which are "factually-incorrect". I think the distinction that should be drawn relates to the finality with which EPA has embraced a given fact, and not whether that fact is "correct".

§ § § § § § §

INTERPRETATION OF THE FREEDOM OF INFORMATION ACT AND THE FEDERAL ADVISORY COMMITTEE ACT

TITLE: Applicability of the Freedom of Information Act and the Federal Advisory Committee Act to Meetings of Subcommittees

DATE: May 4, 1973

I have your memorandum of April 30, 1973, in which you ask several questions concerning the applicability of the Freedom of Information Act and the Federal Advisory Committee Act to meetings of subcommittees of the Environmental Radiation Exposure Advisory Committee.

Your specific questions and my answers are as follows:

QUESTION 1.

Is it appropriate to establish informal subcommittees to carry out the tasks assigned?

ANSWER.

Based on the information contained in your memorandum, it seems both appropriate and lawful to establish informal subcommittees along the lines set forth in your memorandum. The definition of "advisory committee" in the Federal Advisory Committee Act (Public Law 92-463) includes "subgroups" of any other advisory committee. However, OMB (which has authority under the statute to prescribe administrative guidelines and management controls) has published Circular A-63 in the Federal Register, and has drawn a distinction between "formal" and "informal subgroups". According to OMB's interpretation, only formal subgroups fall within the definition of advisory committee set forth in the statute. As I read subparagraph 4(a)(4) of Circular A-63, it is my impression that the subcommittees referred to in your memorandum are "informal". It would follow that they need not have been established in the charter which the parent advisory committee has filed with OMB.

QUESTION 2.

Is it required that informal subcommittee meetings be announced in the Federal Register for work in progress?

ANSWER.

Paragraph 4(a)(4) of OMB Circular A-63 suggests that notices of meetings of an informal subgroup need not be published in the Federal Register. And subparagraph 10(a) of the Circular points out that the provisions of paragraph 10 apply to all advisory committee meetings, including those of formal subgroups, and states further that application of the paragraph to informal subgroups is determined by the parent committee. "subject to review by the agency head or the OMB secretariat to ensure that there is no use of informal subgroups to evade the requirements of the Act." This language suggests that a parent advisory committee may decide to treat the subcommittees--even though they may be "informal subgroups" -- just as the parent committee itself is treated for purposes of the Federal Advisory Committee Act. Whether or not the parent committee chooses to do so appears to be a matter within its discretion, at least until such time as somebody claims that the purpose of the statute is being evaded.

QUESTION 3.

For work in progress on a specific task as defined above do subcommittee meetings have to be open to the public?

ANSWER.

Subcommittee meetings need not be open to the public as a matter of law, for the same reason that their meetings need not be noticed in the Federal Register. It should be noted that the notion of "work in progress" has no legal relevancy. Even under the Federal Advisory Committee Act, certain meetings of advisory committees, and therefore of subgroups, can be closed to the public for reasons enumerated in the statute and in OMB Circular A-63, but none of those reasons has to do with whether or not the meetings is considering "work in progress".

QUESTION 4.

Do draft internal working documents which are used or prepared by a subcommittee have to be made available to the public upon request?

ANSWER.

It is impossible to answer this question in the abstract. The relevant statute here is the Freedom of Information Act. There are exemptions to the Act's general requirement of mandatory public disclosure, but each of those exemptions depends for its applicability on particularized consideration of the document in question. I would assume that the working documents of an advisory committee, or a subgroup thereof, would constitute intra-agency memoranda within the meaning of Exemption No. 5 of the Freedom of Information Act (although the issue is not entirely free from doubt, and has not yet been resolved by the courts). If so, they would be exempt from mandatory public disclosure only to the extent they contained policy advice or recommendations; factual material in such documents would be subject to the disclosure requirement, unless it is "inextricably intertwined" with policy advice and recommendations.

It should be noted that the notion of a "draft" is legally irrelevant to the applicability of the Freedom of Information Act. Nonetheless, it may be that we could argue that the wording of a draft document, and the choice of its contents, constitute in essence the advice and recommendation of the drafter to a superior or a parent body as to the final dimensions of the document, and that a draft should therefore qualify for Exemption No. 5.

QUESTION 5.

You have also asked whether the National Radiation Protection Program Strategy and Plan, a document prepared by ORP can be sent to the subcommittee members without making it available to the public at the same time.

ANSWER.

The public availability of this document, as I understand it, does not depend on whether or not ORP makes it available to the members of an advisory committee. The issue is whether or not it is an identifiable agency record not eligible for one of the exemptions in the statute. The fact that the document is looseleaf and subject to change does not distinguish it, in my view, from the United States Code. And the fact that some of the information contained in it may be "inappropriate" does not make it a secret document. While there may be portions of the document which are eligible for withholding on the grounds that they constitute policy advice and recommendation, or perhaps even on national security grounds, my initial reaction is that any court in the country would immediately order disclosure of this document *in toto*, whether or not it had first been distributed to members of an advisory committee.

$ $ $ $ $ $ $

CONFIDENTIALITY OF INFORMATION

TITLE: Tapes of Advisory Committee Meetings

DATE: April 4, 1973

DISCUSSION

This memorandum is to confirm the substance of our telephone conversation of March 26, 1973, pertaining to the public availability of tape recordings of a meeting of an EPA advisory committee.

As I understand the facts, the meeting of the advisory committee in question was convened in accordance with the procedural provisions of the Federal Advisory Committee Act, and advance notice of the meeting was duly published in the Federal Register. In addition, I further understand that the meeting was not closed to the public, and that members of the public in fact attended. You have now received a request for inspection of the tapes of the meeting from an attorney representing a company that was personally represented at the meeting in question. 1/

It is my opinion that the tapes in question constitute "identifiable records" within the meaning of the Freedom of Information Act, 5 U.S.C. §552(a)(3), that none of the exemptions set forth in 5 U.S.C. §552(b) is applicable, and that the tapes must therefore be made available for inspection by the person requesting them.

As I explained to you on the telephone, no published judicial opinions are squarely on point. But if EPA were sued to compel disclosure of the tapes in question, I would predict with a high degree of confidence that any federal district judge would rule in favor of the plaintiff. I recognize, of course, that a highly technical argument can be made to the effect that a tape is not a "record." I strongly believe, however, that any judge confronted with a decision in this case would fall back on the dictates of common sense. Such a judge would surely point out that the meeting in question was open to the public, that the remarks recorded on the tape were presumptively made for public consumption, and that the Federal Advisory Committee Act itself requires the Agency to prepare publicly available written minutes of a meeting. Such a judge would reason, I believe, that it would constitute an elevation of form over substance for the Agency to argue that a tape in this connection was not a "record." And, since there is no conceivable argument that an exemption in the Freedom of Information Act is applicable, such a judge would order disclosure.

1/ John Adams, the attorney making the request in this case, has advised me that the person representing his client at the meeting was unable to hear all of the proceedings.

I am aware of the arguments earnestly advanced by Mr. Linde of your staff to the effect that (1) members of the advisory committee would prefer that their raw remarks be sanitized by the Agency prior to being made available to the public, and (2) to the effect that the tapes in this case are functionally no different from notes that any of us might take for the purpose of preparing written summaries of oral proceedings. To respond to those points in order:

(1) While certain internal memoranda are exempted from the disclosure requirements of the Freedom of Information Act, on the theory that people will not always be candid if they know their remarks may be publicly available, that philosophy cannot apply to remarks made in a public forum. And, in my view, it violates the spirit of both the Federal Advisory Committee Act and the Freedom of Information Act for an agency to say that it is willing to make a record of public proceedings publicly available only after they have been edited to delete matters that may tend to embarrass the speakers in question.

(2) I agree that a court would probably treat our handwritten notes differently than the tapes now in issue. Such ephemeral work products as handwritten notes, however, are by nature highly selective and subjective. Even if it is kept for essentially the same purpose, a tape is different in that it is the closest approximation of objective truth that modern technology has yet been able to devise for the recording of words. To the extent a tape may be unintelligible in part, or may fail to make it clear which of several people in a room was speaking, those defects of medium are manifest to any person listening to a tape. I therefore believe that a court would distinguish tapes and handwritten notes on the basis of the presumed objectivity of the latter.

§ § § § § § §

TITLE: Confidentiality of Trade Secret Information Obtained under Section 211 ("Regulation of Fuels") of the Clean Air Act

DATE: February 24, 1971

DISCUSSION

1. This is in response to your oral request of February 22, 1971, for our opinion whether the "Clean Air Amendments of 1970" require modification or deletion of the regulation (42 CFR 479.3) relating to the confidentiality of trade secret information obtained pursuant to the Clean Air Act. Specifically, you asked about information obtained under Section 211, "Regulation of Fuels."

2. Prior to the enactment of the 1970 amendments, Section 210(c) read, in part:

> "All information reported or otherwise obtained by the Secretary or his representative . . . [for the purpose of fuel additive registration] which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code shall shall be considered confidential for the purpose of such section 1905..."

3. The "Clean Air Amendments of 1970" repealed this subsection. Moreover, these amendments altered similar provisions in other sections of the Act (see §114(c) and 208(b) to effectuate a general policy of making information obtained under those sections available to the public, except for information determined by the Administrator to relate to trade secrets. Ordinarily, in the absence of an express exemption from 18 U. S. C. 1905, that section would apply even without reference to it in the Clean Air Act. Thus, the question is whether, in light of the repeal of section 210(c) and the other changes, the confidentiality requirement of 18 U. S. C. 1905 becomes inapplicable to information obtained pursuant to section 211 of the Act.

4. While the changes in the 1970 amendments provide some support for the view that even information which "concerns or relates to" a trade secret and which is obtained pursuant to section 211 should not be considered confidential, we think the intent of Congress was to retain the requirement of confidentiality as applied to section 211, with two exceptions.

5. First, section 211(b)(2) expressly states, "The result of . . . tests [to determine public health effects of a fuel or additive under subparagraph (A)] shall not be considered confidential." Second, in obtaining information pursuant to section 211(c)(3)(A), the subpoena power of section 307(a) is applicable. Section 307(a)(1) provides that 18 U. S. C. 1905 applies to trade secret information obtained by subpoena, "[e]xcept for emission data." Emission data which is submitted not in response to a subpoena under section 211(c)(3) is not expressly exempted from 18 U. S. C. 1905 and, therefore, should be afforded confidential status, if the Administrator determines that such data relate to a trade secret.

6. In addition to spelling out the exceptions to the confidentiality requirement, these provisions demonstrate Congressional intent to have 18 U. S. C. 1905 apply to section 211 information, except where expressly made inapplicable. Had Congress intended to exempt section 211 from 18 U. S. C. 1905, it could have so stated.

7. In the absence of such an express exemption, we believe information obtained pursuant to section 211 must remain confidential if it relates to a trade secret, except for test results under section 211(b)(2) and emission data subpoenaed under section 211(c)(3).

8. It should be pointed out that only that information which the Administrator determines "concerns or relates to" trade secrets (18 U. S. C. 1905) is to be considered confidential. Some information, such as the public health effects resulting from use of a known additive, would not be expected to "concern or relate to" a trade secret.

§ § § § § § §

TITLE: Confidentiality of Fuel Additive Information

DATE: September 29, 1971

FACTS

Pursuant to regulations issued under the 1967 Clean Air Act, fuel additive manufacturers and fuel manufacturers have submitted certain information regarding the chemical composition of additives, the use of additives in fuel, and the effect of additives in fuel as a condition of registration of each additive. Representatives of Ralph Nader have contacted the Office of Fuel Additive Registration (AQC) and asked for disclosure of this information. The specific information requested is that contained in the Fuel Additive and Fuel Manufacturer Notification forms which accompany each registration. Certain items of that information have been designated by the manufacturers to be trade secrets or otherwise protected from disclosure under the terms of 18 U.S.C. section 1905.

QUESTIONS

1. Do the exemptions in the public Disclosure Act prevent EPA from releasing the information requested which is designated a trade secret or otherwise protected information?

2. Does 18 U.S.C. section 1905 prevent disclosure of the information?

3. What factors determine whether an item of information is protected, either as a trade secret or otherwise?

4. What procedure should EPA follow in determining what may be disclosed in this case and in future situations?

ANSWER

The exemptions in 5 U.S.C. section 552 permit the information to be withheld from disclosure but do not prohibit the disclosure. The information is, however, subject to the prohibitions contained in 18 U.S.C. section 1905 against disclosure of trade secrets. The agency may, therefore, disclose only that information which is not, as a matter of law, a trade secret or otherwise protected. Determination of what is a trade secret will depend on an analysis of the facts, using as a guideline the factors contained in the discussion below. The knowledge of analytical chemists familiar in the field will be required. Since final designation of the information as a trade secret or not depends on a variety of facts, the manufacturers who have designated their fuel or additive information as trade secrets should be given the opportunity to substantiate their claim before any disclosure is made.

DISCUSSION

1. Section 552 of Title 5 of the United States Code states a general policy of disclosure of information obtained by the Government. A specific exemption to this obligation is contained in 5 U.S.C. section 552(b)(4) which applies to trade secrets and commercial or financial information that is privileged

or confidential. Thus, the Administrator is not required to divulge the information in question which is a trade secret or which is commercial or financial information that is privileged or confidential. However, this exemption does not prohibit the disclosure of such information; it merely authorizes the withholding of the information and does not require the Administrator to keep the information confidential. There have been no cases holding disclosure of such information is prohibited under this exemption. The Attorney General's office has indicated that disclosure may be made of information covered by the exemption[1] and Professor Davis has been even more explicit in his interpretation of the Public Information Act: "The Act never forbids disclosure. It never protects privileged or confidential information from disclosure; it protects only from required disclosure."[2] Section 552(b)(3) contains an exemption for information that is specifically exempted from disclosure by statute. Therefore, reference must be made to statutes such as 18 U.S.C. section 1905 before any disclosure is made. Thus, the effect of 5 U.S.C. section 552 is neither to require nor to prohibit the disclosure of trade secret or confidential information. The disclosure of such information remains within the discretion of the official, subject to any other pertinent laws.

2. Section 211 of the Clean Air Act does not contain any language relating to the disclosure of information obtained from manufacturers under that section. This is in contrast to other sections of the Act such as section 208(b) which enunciate a policy of disclosure unless the information is entitled to the status of a trade secret under 18 U.S.C. section 1905. The predecessor section of 211 contained language protecting trade secrets or other matter referred to in 18 U.S.C. section 1905,[3] but this was deleted by the 1970 amendments. The effect of this omission is not clear. Whether information which does not contain or relate to a trade secret obtained under section 211 should be disclosed has not yet been determined. But it appears that information obtained pursuant to section 211 should be held confidential if it relates to trade secrets as provided in 18 U.S.C. section 1905, except for test results under section 211(b)(2)(B) and emission data subpoenaed under section 211(c)(3) and section 307(a).

3. The provisions of 18 U.S.C. section 1905 are as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

4. This section prohibits the disclosure of any information obtained from the manufacturers which "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, . . . of any person, firm, partnership, corporation, or association." The determination of what items of information obtained from the manufacturers may be disclosed therefore depends on an interpretation of what items are in fact trade secrets or secret processes. The manufacturers have designated that information which they believe is a trade secret or otherwise confidential. Information not so designated has already been disclosed. However, treatment of information by the manufacturer as a trade secret is not the determining factor. It is the ultimate responsibility of the official in possession of the information to make the final decision as to what should or should not be considered a trade secret, based on information received from the manufacturers and knowledge of the industry. Clearly, the decision of the official is not immune from attack and the final determination of the status of any of this information would have to come from a court of law. By using past judicial guidelines, the official can consider the same factors the court would use in reaching the decision.

5. Unfortunately, judicial interpretation of 18 U.S.C. section 1905 has not been extensive. It is therefore necessary to consider trade secrets in other areas. Obviously, the problem is more difficult in view of the wide range of information that EPA has been asked to disclose. Since there is no specific item which we can specifically discuss, this memorandum can only suggest general guidelines and considerations to apply to each particular item of information.4/

6. An exact definition of a trade secret does not exist since courts interpret each case on its facts and often define the trade secret in terms to reach the conclusion the court feels is warranted in the particular case. 5/ The most often cited definition of a trade secret is found in the Restatement of Torts (1939), section 757 (comment b):

> A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating, or preserving materials, a pattern for a machine or other device, or a list of customers . . . A trade secret is a process or device for continuous use in the operation of the business. Generally, it relates to the formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers or a method of bookkeeping or other office management.

Some courts have provided their own general definitions which contain essentially the Restatement language. 6/

7. The range of information which may be considered a trade secret is, therefore, quite broad. However, everything which could be a trade secret will not necessarily be entitled to protection. Final determination in each case rests with an analysis of the item in light of the various factors which have been judicially determined to be a consideration in finding trade secrets.

8. First, it is essential that there be some element of secrecy involved and that the information not be generally known in the trade. 7/ For example, in one case, the ingredients in a cake food mix which were common knowledge in the baking industry could not be a trade secret. 8/ In Pretexol Corporation v. Koppers Company, 229 F.2d 635 (2d Cir. 1956), the plaintiff had a formula for a fire retardent for wood. The elements in the composition were generally known in the trade but the specific proportions were not. The defendant marketed a similar product using the same elements but in different proportions than used by plaintiff. The court refused to prohibit defendant's sale of the similar product since it found that the combination of the chemicals was not new and plaintiff's only claim for a special property right could be based on the proportion or percentage of the chemicals in the product. Since the new product had different proportions, there was no infringement on the secret process of the plaintiff. Also, a system or arrangement of components may be the subject of a trade secret, even though each component is known and a part of the public domain, when the unified process, design and operation of the system is a unique combination and is

not known in the trade so that a competitive advantage is provided. 9/ Even though a process is not complicated, it can be a trade secret when no one else has it and it is not possible to discover the process by examination of the finished product. 10/ To be a trade secret, a product need not reach the status of an invention, but it must represent some considerable independent efforts on the part of the claimant. 11/

9. If a device or process has in fact been patented, it cannot be a trade secret. 12/ Because the patent discloses the process or device to all who wish to examine it, the element of secrecy is gone and protection is not necessary. If discovery occurs by independent research of other companies, there also is no basis for protection. In Drew Chemical Corporation v. Star Chemical Company, 258 F. Supp. 827 (W.D. Mo. 1966), a company sought protection of its formula for a beaded stabilizer-emulsifier used in ice cream which was being produced by former employees in competition with the plaintiff. The court refused to enjoin the use of the product since it found that, while at one time the process was unique and conferred a competitive advantage thus deserving protection as a trade secret, other companies had discovered the process by independent research and were using it. It had, therefore, become public property and the defendant company could not be prevented from using it. If disclosure occurs by other means, secrecy will likewise no longer exist and require protection. For example, if an examination of an item sold in the open market would reveal that which is alleged to be secret, courts will not protect the item by designating it a trade secret. 13/ If inspection of the components of a device, however, still does not reveal the essence of the secret, protection would be in order. 14/ While some courts have stated that the possibility of "reverse engineering" should not eliminate the protection of trade secret status, the basis for such decisions is the desire to protect against or punish for a breach of a confidential relationship. 15/ Where there is no reprehensible conduct involved in the disclosure, the need for protecting a process or device that could be reverse engineered should not be as great.

10. Having in mind the general nature of a trade secret and the policy reasons for its being protected, we must have some tests to utilize in making a final determination. The following factors have been used by courts to reach their conclusions: 16/

A. To what extent was it treated as a trade secret? This involves examination of several factors such as what measures were taken by the manufacturer to safeguard the secrecy of the information and how widely known was the information among the employees and others connected with the business.

B. To what extent was the information known outside the manufacturer's own business? This depends on an analysis of the particular industry to see what other manufacturers know about it. As discussed above, if it is well known in the industry, protection will not be provided.

C. Has the item or process been duplicated by anyone else while it was on the open market? If other manufacturers have similar processes or products, there is not as great an interest in protecting the confidentiality of it.

D. What is the value of the information to the manufacturer and to its competitors? If the information is of only minimal value, it should probably not be afforded protection; something that confers a great competitive advantage deserves protection from disclosure to competitors. We must determine the amount of damage the manufacturer would suffer from disclosure. If it is a single non-recurring item, it would probably not deserve protection while something used in an ongoing business and of some continuing value to that business would.

E. How much money and effort was expended by the manufacturer in developing the process or product?17/ One consideration here is whether the manufacturer has had sufficient opportunity to reap an adequate return on its investment.

F. What is the ease or difficulty with which the information could be properly acquired or duplicated by others? If, in fact, from the sale of the product competitors could examine it and discover what is allegedly a trade secret, it should not be protected. Items will vary greatly in the degree of difficulty to "reverse engineer" to discover secret processes or ingredients. It will be necessary to make a value judgment at some point that other manufacturers should not be given the information and avoid the exertion of money and effort. We will also have to consider the reasons the other manufacturers have not "reverse engineered" before or whether they have done so and have rejected the use of it.

G. What benefit will flow from the disclosure? This includes analysis of to whom the benefit will accrue along with consideration of the public need for disclosure and whether the need can be satisfied in any other way.

11. Answering the above questions about each item of information designated a trade secret will require extensive effort on the part of individuals knowledgeable in the field. We can say what a court would look to in making its determination but it will take a scientist familiar with the development of fuel additives to provide answers to the questions. Even then, the problem is not resolved. Once we know the answers to questions such as how well it is known in the trade and how much effort would be required to reverse engineer the product, someone must make the decision on cases that are between the extremes. It is impossible to determine from case law where the line should be drawn. Each case is decided on its own particular facts. The same will have to be done here.

12. Since with each item of information one of the two interested parties will be dissatisfied, decisions should be made conservatively. If disclosure is made, it cannot be retracted and the provisions of 18 U.S.C. section 1905 become effective if a court were to decide that the information was in fact a trade secret. If disclosure is withheld in each case where there is some possibility that it would be declared a trade secret, the worst result, aside from publicity, would be a court order determining that it was not a trade secret and compelling disclosure.

13. Any attempt by EPA to determine whether an item of information is in fact a trade secret must necessarily be only an educated prediction of what a court of law would decide. There is no specific definition we can apply and therefore a trade secret only exists when a court says it does. EPA should therefore attempt to consider all factors a court would and then make its decision. For this reason, all pertinent information should be obtained from the manufacturers upon which they would rely in sustaining their position. Upon comparing this data with knowledge of EPA's own scientists and other technical persons, a decision can be reached. If manufacturers have not presented their reasons for claiming protection, they should be notified of the request for disclosure prior to final determination. This procedure should apply in this situation and in future cases involving requests for information that could be considered a trade secret.

§ § § § § § §

FOOTNOTES

1/ "Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June, 1967), pp. 2-3.

2/ K. Davis, *Administrative Law Treatise, 1970 Supp.*, p. 171.

3/ "All information reported or otherwise obtained by the Secretary or his representative pursuant to subsection (b), which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of such section 1905, . . ." Clean Air Act of 1963 as amended by the Air Quality Act of 1967, section 210(c).

4/ These guidelines must necessarily come from cases not precisely in point with the situation under discussion, insofar as the facts are concerned. Most of these cases deal with the protection of trade secrets from disclosure by former employees or businesses to whom a confidential disclosure had been made during business negotiations. These are generally tort cases and as such focus upon the accountability of the person making the information public. The disclosure under discussion here must be based on a different premise since there is no tortious conduct involved in the disclosure. As with cases involving disclosures in open court, the decision rests with a determination of whether the "need for confidentiality outweighs the undesirability resulting from the protective treatment." Gellhorn, *Business Secrets in Administrative Agency Adjudication*, 22 *Ad. L. Rev.* 515 (1970); *Smith* v. *Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953).

5/ For one view of the problem see Note "Trade Secret Protection of Non Technical Competitive Information," 54 *Iowa L. Rev.* 1164 (1969) at 1169:

> A trade secret is often defined as anything which is secret and which confers a competitive advantage. However, examination of the cases demonstrates that protection is not afforded to all information which presumably falls within this broad definition. Rather the term "trade secret" is applied only after the determination has been made that the information deserves protection. If protection seems justified, the court will emphasize employee misconduct, wrongful acquisition or unjust enrichment . . . . If, however, the court decides that the information does not warrant protection, the court will apply a more restrictive

> definition, such as requiring a minimal amount of uniqueness" of the information. Therefore, the term "trade secret" seems purely conclusory and without value as a means of determining the extent of protected information.

6/ "What is a trade secret is difficult to define. However, on the whole, it must consist of a particular form of construction of a device, a formula, a method or process that is of a character which does not occur to persons in the trade with knowledge of the state of the art or which cannot be evolved by those skilled in the art from the theoretical description of the process, or compilation or compendia of information or knowledge." Sarkes Tarzian, Inc. v. Audio Devices, Inc., 166 F. Supp. 250, 257-58 (S.D. Cal. 1958).

7/ "The subject matter of a trade secret must be secret. Matters of public knowledge or of a general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to others pledged to secrecy. He may likewise communicate it to employees involved in its use. Others may know of it independently, as for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information." Restatement of Torts (1939), section 757 (comment b).

8/ Henning v. Kitchen Art Foods, 127 F. Supp. 699 (S.D. Ill. 1954).

9/ Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969); Imperial Chemical Industries, Ltd. v. National Distillers Chemical Corp., 342 F.2d 737 (2nd Cir. 1965).

10/ Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969).

11/ Ferroline Corporation v. General Aniline and Film Corporation, 207 F.2d 912 (7th Cir. 1953),

> A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not a requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the

> inventor, but such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection, it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability." *Restatement of Torts* (1939), section 759 (comment b).

12/ *Ferroline Corporation* v. *General Aniline and Film Corporation*, 207 F.2d 912 (7th Cir. 1953); *Midland-Ross Corporation* v. *Sunbeam Equipment Corporation*, 316 F. Supp. 171 (W.D. Pa. 1970); *Forest Laboratories, Inc.* v. *Formulations, Inc.*, 299 F. Supp. 202 (E.D. Wisc. 1969); *Painton and Company* v. *Bourns, Inc.* 309 F. Supp. 271 (S.D. N.Y. 1970).

13/ *Midland-Ross Corporation* v. *Sunbeam Equipment Corporation*, 316 F. Supp. 171 (W.D. Pa. 1970); The Court in *Midland-Ross* found that even though ascertaining all of the facts about the item from an inspection would take some time and effort, the sale still defeated the claim that it was a secret. See also, *Midland-Ross Corporation* v. *Yokana*, 293 F.2d 411 (3rd Cir. 1961).

14/ *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F.2d 163 (5th Cir. 1969).

15/ *Sperry Rand Corporation* v. *Rothlein*, 241 F. Supp. 549 (D. Conn. 1964); See also, *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F.2d 163 (5th Cir. 1969); "Its [trade secret] protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith or reprehensible means of learning another's secret." *Cataphote Corporation* v. *Hudson*, 422 F.2d 129, 1294 (5th Cir. 1970); In *Smith* v. *Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953), the court observed that in Pennsylvania, the test was not whether the design could have been obtained through inspection but how in fact did the other party learn the design. The court was concerned with condemning the employment of improper means to procure the trade secret. The court at 375 cited Nims, *Unfair Competition and Trademarks*, section 148; "The fact that a trade secret is of such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive its owner of the right to protection from those who would secure possession of it by unfair means."

16/ See *Restatement of Torts* (1939), section 757; Gellhorn, *supra*, note 14. In the Gellhorn article, the author points out that many of the factors discussed here are used by examiners in Federal Trade Commission hearings when determining whether to allow the testimony in open court. *Lehigh Portland Cement Co.*, 3 Trade Reg. Rep. paragraph 18,475 at 20,832-33 (FTC 1968).

17/ "The real test is: Is the process, formula, etc. one which requires a considerable amount of time, effort, and/or money to obtain? It is the work and effort required, not the quality of the mental operations needed to produce the final result. Many things can be worked out by anyone of reasonable intelligence provided they spend the requisite amount of time and/or money to do so. Whether or not the results are protectable as trade secrets depends on how much time and/or money is required to work them out. Obviously, it would do more harm than good for every trifling fact to be protected as a trade secret." R. Ellis, Patent Assignments and Licenses, 2nd Ed. (1943) at 17.

§ § § § § § §

TITLE: Confidentiality of Information Obtained Pursuant to §210
of the 1967 Clean Air Act -- Federal Employees Not
Concerned with Carrying out the Act

DATE: June 7, 1971

QUESTION

This is in response to your memorandum of March 15, 1971, inquiring whether the Administrator is authorized to release trade secret information obtained pursuant to §210 of the 1967 Clean Air Act to Federal employees not concerned with carrying out that Act.

ANSWER

Trade secret information obtained pursuant to §210 of the 1967 Clean Air Act may be released by the Administrator to other Federal employees if such employees are concerned with carrying out the Clean Air Act "or when relevant in any proceeding under Title II of the Act." The only other situation in which trade secret information may be divulged to other Federal employees is if an employee, acting in his official capacity, seeks this information for an authorized purpose on behalf of an agency which is empowered to issue subpoenas to another Federal agency to obtain such information. The information should be released upon the condition that it will be treated as confidential by the receiving agency.

DISCUSSION

1. Section 210(c) of the Clean Air Act of 1967 ("Registration of Fuel Additives") provides,

> (c) All information reported or otherwise obtained by the Secretary or his representative pursuant to subsection (b), which information contains or relates to a trade secret or other matter referred to in §1905 of Title 18 of the United States Code, shall be considered confidential for the purpose of such §1905, except that such information may be disclosed to other officers or employees of the United States concerned with carrying out this Act, or when relevant in any proceeding under this title . . . ." [Emphasis added.]

2. Pursuant to that section, regulations were issued:

> "All information reported to . . . the Secretary or his representatives pursuant to this part, which information contains or relates to a trade secret or other matter referred to in §1905 of Title 18 of the United States Code, shall be considered confidential for the purpose of such §1905, except that such information may be disclosed to other officers or employees of the United States concerned with carrying out this Act or when relevant in any proceeding under Title II of the Act."[1]

---

[1] 42 CFR 79.3

3. While the "Clean Air Amendments of 1970" eliminated §210(c), 2/ §16(b) of the amendments provided that "[r]egulations . . . issued under Title II of the Clean Air Act prior to enactment of this Act shall continue in effect until revised by the Administrator." Since the regulations remain in effect there is no authorization for voluntary disclosure of any trade secret information to any Federal officer or employee, except: (1) "to other officers or employees of the United States concerned with carrying out this Act," or (2) "when relevant in any proceeding under Title II of the Act." We note, however, that the Administrator would be authorized to release trade secret information in response to a subpoena validly issued by a Federal agency or in response to a request by a Federal agency with authority to issue a subpoena to another Federal agency to obtain such information. 3/
4. More specifically, in regard to the request by the National Bureau of Standards for certain information, we agree with your letter of February 19, 1971, to Mr. James R. McNesby, that you are unauthorized to release trade secret information for purposes not contemplated by the Clean Air Act. However, if a particular chemical compound is widely known and used in the industry, its identity would not constitute a trade secret and may be disclosed. 4/ Furthermore, the legislative history of the "Clean Air Amendments of 1970" indicates Congressional intent that those who submit information which they wish to have kept confidential bear the burden of proving

---

2/ Section 210 of the 1967 Act became §211 as a result of the 1970 Amendments.

3/ It is clear that information may be subject to subpoena by a Federal agency notwithstanding the fact that it contains or relates to a "trade secret." Menzies v. FTC, 242 F.2d 81 (4th Cir., 1957); FTC v. Tuttle, 244 F.2d 605 (2d Cir. 1957); FTC v. Hallmark, Inc., 170 F. Supp. 24 (N.D. Ill. 1958); FTC v. Waltham Watch Co., 169 F. Supp. 614 (S.D. N.Y. 1959). Since a Federal employee may not lawfully resist a valid subpoena issued by another agency, Congress must have intended to create an implicit exception to 18 U.S.C. 1905, which prohibits the release of trade secret information, in the case of such subpoenas. Moreover, it would seem that one agency of the executive branch would not have to insist on a subpoena when it has a request in writing from a sister executive agency with subpoena power.

4/ "The subject matter of a trade secret must be secret. Matters of . . . general knowledge in an industry cannot be appropriated by one as his secret." Restatement of Torts, §757; Speedry Chemical Products, Inc. v. Carter's Ink Co., 306 F.2d 328 (2nd Cir. 1962); Cataphote Corp. v. Hudson, 422 F.2d 1290 (5th Cir. 1970).

that such information constitutes a "trade secret."[5] The mere assertion by a manufacturer that certain information contains trade secrets does not constitute proof. Manufacturers of fuel additives claiming confidential status for specified information should be notified that unless proof is supplied which satisfies the Administrator that the information contains a trade secret, such information may be disclosed to the public. If insufficient evidence is forthcoming, the information in question may be divulged to Government employees not charged with carrying out the Clean Air Act, as well as to the public.

5. Finally, in regard to the request by the Department of the Army, a telephone conversation with Mr. Ammlung, Acting Director of the Coating and Chemical Laboratory, indicates that the Laboratory is charged with setting standards for fuels to be used in Federal motor vehicles. In addition, the Laboratory is responsible for assuring that fuels procured by the U. S. Army comply with applicable Federal and State standards. Since these functions are concerned with carrying out §118 of the Clean Air Act ("Control of Pollution from Federal Facilities"), trade secret information submitted to your office may be released to the Laboratory upon the understanding that the information will be considered confidential by the Laboratory as expressed in Mr. Ammlung's letter of February 26, 1971.

§ § § § § § §

TITLE: Protection of Process Data as Trade Secrets

DATE: October 6, 1972

MEMORANDUM OF LAW

FACTS

William Johnson of Region X has recently raised the issue of the confidentiality of process data submitted by a source to EPA pursuant to §114 of the Clean Air Act. In order to provide substitute regulations for a disapproved State implementation plan, EPA proposed an emission regulation applicable to the source involved; the regulation was expressed in terms of pounds of pollutant per ton of materials processed. Responding to EPA's request under §114 of the Act, the source supplied the process data, but requested that they be kept confidential by the Agency.

QUESTION

Is EPA obligated to protect from public disclosure process data which are obtained pursuant to §114 of the Clean Air Act?

---

[5] S. Rep. on S. 4358 (No. 91-1196), September 17, 1970, p. 31: "The Committee believes that requiring the person filing records and reports to prove the need for proprietary protection would avoid abuse of §1905 of Title 18 of the United States Code . . ."

ANSWER

In general, process data submitted to the Administrator under §114 of the Act are entitled to confidential treatment if a source satisfies the Administrator that the data consitute trade secrets. However, if such data are submitted following the proposal or promulgation of an emission standard expressed in terms of process values, the process data may become emission data which cannot qualify for confidential treatment under §114, even if they constitute trade secrets.

DISCUSSION

1. Section 114 of the Clean Air Act provides the Administrator broad authority to gather information from sources --

> "For the purpose of (i) developing or assisting in the development of any implementation plan under section 110 or 111(d), any standard of performance under section 111 or any emission standard under section 112, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out section 303."

Process data are obtainable by the Agency under section 114.

2. Under §114(c), the person submitting the information may obtain confidential treatment for such information in accordance with 18 U.S.C. 1905 if such person can satisfy the Administrator that the information, "if made public, would divulge methods or processes entitled to protection as trade secrets of such person." The section provides further, however, that emission data cannot qualify for such confidential treatment. The issue, then, is whether process information constitutes or could ever constitute emission data.

3. The Congress' purpose in providing for disclosure of emission data in the hands of EPA (§114(c)) or a State or local agency (§110(a)(2)(F)) was to insure that the public would have access to the information necessary to determine whether sources are in compliance with applicable emission limitation regulations. 1/ In our view, any information which is necessary to that determination must be characterized as emission data.

1/ The language of §114(c), which originated in the Senate bill (S. 4358), was discussed by the Senate Committee on Public Works as follows:

> "In this section the bill also would incorporate provisions designed to acquire and make available to the public information regarding compliance with the applicable emission standards. The Committee believes that the public right to know what is being emitted overrides the proprietary character of such information." (S. Rept. No. 91-1196, 91st Cong., 2d Sess., p. 19)

4. Any interpretation of "emission data" which would tend to frustrate public surveillance is inconsistent with the legislative purpose in §304, the provision for enforcement suits by citizens.[2]

5. Until the Administrator or a State or locality proposes or promulgates a specific emission regulation which incorporates process values, process data in the hands of the public is not directly relevant to any emission limitation, and therefore can serve no public surveillance purpose. While the confidential status of process information is more critical following the promulgation of an emission regulation which incorporates a process value, we believe that the availability of this information to the public at the proposal stage is essential to informed public involvement in the standard-setting process, upon which the Act places much importance. Prior to such proposal or promulgation, trade secret process data in the possession of the Agency are of potential benefit only to the competitor of the person who submitted the data. Accordingly, we think that the chronology of the development of standards is important under the Act in determining whether public disclosure of process data is required.

---

[2] The importance of public disclosure of emission data to the implementation of §304 is emphasized in the legislative history. (S. Rept. No. 91-1196, 91st Cong. 2d Sess., p. 38)

TAX

TITLE: EPA Guidelines Under I. R. C. Section 169

DATE: June 8, 1971

In light of your recent separate memoranda, I have taken another look at the legislative history of Section 169 of the Internal Revenue Code. I am of the opinion that paragraphs 3(d) and 4(b)(3) of our guidelines should remain in their present form. Naturally, it is understood that the effect of the paragraphs in question may sometimes be to discourage the use of a "cleaner" process, in favor of the addition of hardware which is less efficient but which is eligible for certification as a pollution control facility.

I think it is clear that Section 169 is not intended to apply to the choice of a cleaner production process. Senate Report No. 91-552 states at page 249:

> "Since the cost of modifying an existing plant for pollution control purposes generally is substantially in excess of the cost of incorporating pollution control facilities into a new plant, the committee has limited the scope of the amortization deduction to facilities which have been added to existing plants."

A similar thought is found in House Report 91-413. I think the intent was generally to deny the rapid write-off where management installs new productive facilities which meet applicable standards, and to grant the write-off where it retrofits older productive facilities which would not otherwise meet the standards. Congress presumed the latter would generally be more costly, and therefore deserving of the de facto subsidy in Section 169. In addition, several witnesses at the Senate hearings argued unsuccessfully for a change in the statute to permit certification of cleaner processes (Statement of the American Natural Gas Company, at page 4910 of the Senate hearings; statement of Stroock & Stroock & Lavan, at page 6545).

I concede that we have already stretched the legislative history, in that our regulations provide for partial certification of a facility which performs a function in addition to pollution abatement. But the language of the statute itself supports the position we took in that regard. And, had we taken that position, we would have been driven to the absurd length of refusing to certify a facility that was 99% devoted to waste removal.

In connection with the point you raise, on the other hand, I find it difficult to end-run the legislative history. I also believe it would be unwise to do so. I disagree that the allocation problem would be no more complicated than it already is if we were to certify some portion of the cost of switching to a "cleaner" process.

There may be three alternative procedures which management could have chosen at different costs, and I do not see how one can reasonably allocate some portion of the chosen facility's cost to pollution abatement.

If a plant makes a process change, where does the "facility" begin and end?

Does it include all equipment purchased in connection with the cleaner process and all incremental costs?

Must we certify something whenever management opts for a productive process that is "cleaner" than any one of the existing alternatives?

If you both remain unhappy, I might point out in conclusion that the foregoing discussion is irrelevant whenever a taxpayer replaces more than 20% of his productive facilities; under the Treasury regulations, he has a "new" plant, and so cannot qualify for the rapid write-off anyway.

§ § § § § § §

TITLE: Certification of Pollution Control Facilities Eligible for Accelerated Amortization Under Section 169 of the Internal Revenue Code

DATE: May 19, 1971

1. GENERAL

Final EPA regulations governing certification of pollution control facilities, both water and air, which qualify for favorable tax treatment under Section 169 of the Internal Revenue Code have just been published in the Federal Register. You have received a copy of these regulations. They are complementary to regulations recently published by the Treasury Department. The purpose of this memorandum is to offer guidance in handling the many inquiries from industry which the Regional Offices will probably soon receive.

Section 704 of the Tax Reform Act of 1969, (P.L. 91-172, December 30, 1969), added a new Section 169, "Amortization of Pollution Control Facilities", to the Internal Revenue Code. The new section provides for the amortization of the cost of certified pollution control facilities over a sixty-month period, if specific qualifying conditions are met.

The Act defines a "certified pollution control facility" as a "new identifiable treatment facility" which is:

> (a) used in connection with a plant or other property in operation before January 1, 1969 (that is, an "old" plant), to abate or control pollution by removing, altering, disposing or storing pollutants, contaminants, wastes or heat;
>
> (b) which is constructed, reconstructed, or erected by the taxpayer after December 31, 1968; and

(c) which is placed in service before January 1, 1975.

2. Policies reflected in the regulations. The Treasury Department's regulations, as originally proposed, were generally restrictive, favoring administrative simplicity instead of encouraging the installation of pollution abatement equipment. Such restrictiveness has been eliminated to a large degree. You should be particularly aware of the following problem areas and of their respective resolutions in the final regulations:

a. Multiple-purpose facilities. While the statute defines a "certified pollution control facility", it is silent as to whether a facility can qualify for favorable tax treatment if it serves a function other than the abatement of pollution. The final regulations make it clear that it can. Otherwise, the effect might have been to discourage installation of sensible pollution abatement facilities in favor of less efficient single-function facilities which qualified for the deduction.

The thrust of the foregoing decision, however, is to place upon EPA the burden of deciding what portion of a given facility's cost is properly allocable to its abatement function. The regulations require the applying taxpayer to make such an allocation in his application, and to justify his grounds therefor. The function of the Regional Offices will be to review those allocations on paper. It is not anticipated that on-site inspections will be generally necessary or desirable for the purpose of such review, except in cases involving large sums of money and unusual types of equipment.

b. Facilities serving both old and new plants. As noted previously, the statute requires that a pollution control facility must be used in connection with a plant or other property that was in operation prior to January 1, 1969. Several of the comments received on EPA regulations, as previously proposed, argued that a facility used in connection with pre-1969 properties as well as in connection with later ones, should qualify for the deduction to the extent it is used in connection with pre-1969 facilities. The final regulations accept the reasoning of that argument.

Again, the taxpayer will submit his theory of the allocation of the cost of the facility as between old and new plants or properties and the Regional Offices will have to review the allocation. Such an allocation will result in a percentage. We believe that the most appropriate method of making such an allocation is to compare the capacity of the pre-1969 plant to the capacity of the control facility. Assume, for example: the old plant has a capacity of 80 units of effluent (but an average output of 60 units); the new plant has a capacity of 60 units (but an average output of 20 units); and the control facility of 150 units. In such case, 80/150 of the cost of control facility would be eligible for rapid amortization.

We have not chosen to make a binding rule of the foregoing however, until some experience with the new regulations has been accumulated. Should a taxpayer present a seemingly reasonable method of allocation different from the foregoing, Regional Office personnel are invited to consult with this office and with the Water Quality Office.

c. Profit-making facilities. The statute denies favorable tax treatment to facilities the cost of which will be recovered from profits derived through the recovery of waste, "or otherwise". The final regulations reflect two decisions not expressly made by statute.

(1) Partial recovery of cost. If an abatement facility recovers marketable wastes, estimated profits on which are not sufficient to recover the entire cost of the facility, the amortizable basis of the facility will be reduced in accordance with the Treasury regulations. The responsibility of the Regional Offices will be only to identify for Treasury's benefit those cases in which estimated profits will in fact arise; their amount, and the extent to which they can be expected to result in cost recovery, will be determined by the Treasury Department. Accordingly, the responsibility of the Regional Offices is, for all practical purposes, only to notify the Treasury Department when marketable by-products are recovered by the facility. Such notification will be included in EPA's form of certification.

(2) Leased facilities. The EPA regulations make it clear that a taxpayer cannot qualify for rapid amortization under Section 169 if he is in the business of storing, altering, or recovering pollution produced by others. In any such case, it is assumed that he will recover the cost of his facilities through the fees he charges for their use.

The regulations, therefore, provide that EPA will not certify a facility which is subject of a separate charge for its use.

3. Air pollution control facilities.

a. Pollution control or treatment facilities normally eligible for certification. A new identifiable air pollution control and/or treatment facility is a facility that is a part of, or associated with, the taxpayer's plant or other property and which is used to abate or control air pollution by removing, altering, disposing, or storing of pollutants, contaminants, or wastes. Such a facility may include the following devices:

(1) Inertial separators (cyclones, etc.)
(2) Wet collection devices (scrubbers)
(3) Electrostatic precipitators
(4) Cloth filter collectors (baghouses)
(5) Direct fired afterburners
(6) Catalytic afterburners
(7) Gas absorption equipment
(8) Gas adsorption equipment
(9) Vapor condensers
(10) Vapor recovery systems
(11) Floating roofs for storage tanks
(12) Combinations of the above

b. Air pollution control facility boundaries. Most facilities are systems consisting of several parts. The facility need not start at the point where the gaseous effluent leaves the last unit of processing equipment, nor will it in all cases extend to the point where the effluent is emitted to the atmosphere or existing stack, breeching, ductwork or vent. It includes all the auxiliary equipment used to operate the control system, such as: fans, blowers, ductwork, valves, dampers, electrical equipment, etc. It also includes all equipment used to handle, store, transport, or dispose of the collected pollutant material.

c. Example of eligibility limits. The amortization deduction is limited to any new identifiable treatment facility which removes, alters, or disposes of contaminants or wastes. It is not available for all expenditures for air pollution control and is limited to devices which actually remove, destroy or store air pollutants.

(1) Boiler modifications or replacements. Modifications of boilers to accommodate "cleaner" fuels are not eligible for amortization: e.g., removal of stokers from a coal-fired boiler and the addition of gas or oil burners. The purpose of the burners is to produce heat and they do not qualify as air pollution control facilities. A new gas or oil fired boiler that replaces a coal-fired boiler would also not be eligible.

(2) Fuel processing. Eligible air pollution control facilities do not include pre-processing equipment which removes potential air pollutants from fuels prior to their combustion. For example, a sulfur recovery plant in a petroleum refinery where the desulfurized fuel is burned in the refinery to produce heat would not be eligible, not would a coal washing operation where the coal is sold to be burned elsewhere.

(3) Incinerators. The addition of an afterburner, secondary combustion chamber or particulate collector would be eligible.

(4) Collection device used to collect product or process material. In some manufacturing operations, collection devices are used to collect product or process material and not for air pollution control. Such would be the case in manufacturing carbon black. The baghouse would be eligible for certification, but the certification would alert the Treasury Department of the profitable waste recovery involved.

d. Replacement of manufacturing process by another non-polluting process. An installation will not qualify for certification where it utilizes a process known to be "cleaner" than an alternative, but where it does not actually remove, alter or dispose of pollution; as, for example, a minimally polluting electric induction furnace to melt cast iron which replaces, or is installed instead of, a heavily polluting grey iron cupola furnace. However, if the replacement equipment has an air pollution control device added to it, the control device would be eligible while the process device would not. For example, in the case where a primary copper smelting reverberatory furnace is replaced by a flash smelting furnace, followed by the installation of a contact sulfuric acid plant, the sulfuric acid plant would qualify (since it is a control device not necessary to the process), while the flash smelting furnace would not qualify, as its purpose is to produce copper matte.

4. Water pollution facilities.

a. Pollution control or treatment facilities normally eligible for certification. A new identifiable water pollution control and/or treatment facility is a facility that is a part of, or associated with, the taxpayer's plant or other property and which is used to abate or control water pollution or contamination by removing, altering, disposing, or storing of pollutants, contaminants, wastes or heat. The following examples of new identifiable treatment facilities will be helpful:

(1) Included are pretreatment facilities such as those which neutralize or stabilize industrial and/or sanitary waste, from a point immediately preceding the point of such treatment to a point of disposal to and acceptance by a metropolitan or a municipal waste treatment facility for final treatment, including the necessary pumping and transmitting facilities. Not eligible, however, is a waste pre-treatment facility that will provide a degree of treatment less than that necessary or required to provide an effluent that will comply with established Federal, State and local effluent or water quality standards, codes and/or regulations, and which is not included in or a part of a final treatment system to provide an acceptable degree of treatment meeting applicable standards.

(2) Included are treatment facilities such as those which neutralize or stabilize in compliance with established Federal, State and local effluent or water quality standards, industrial and/or sanitary waste, from a point immediately preceding the point of such treatment to a point of disposal, including the ancillary pumping and transmitting facilities.

(3) Included are ancillary devices and facilities such as lagoons, ponds, and structures for the storage and/or treatment of wastewaters or waste from a plant or other property.

(4) Included are devices, equipment or facilities constructed or installed for the primary purpose of recovering a by-product of the operation (saleable or otherwise), previously lost either to the atmosphere or to the waste effluent:

(a) A facility to concentrate and recover gaseous or vapor (HCl, NH_4, P_2O_5, Nitrogen or sulfur oxides, CO_2, and CO_3, F, etc.) by-products from a process stream for re-use as raw feedstock or for resale, unless the estimated profits from resale exceed the cost of the facility. See paragraph 2(c)(1) above.

(b) A facility to concentrate and/or remove "gunk" or similar type "tars" or polymerized tar-like materials from the process waste effluent previously discharged in the plant effluents.

(c) Devices used to extract or remove a soluble constituent from a solid or liquid by use of a selective solvent: open or closed tanks, vessels; diffusion batteries of tanks or vessels for countercurrent decoutation, extraction or leaching, etc.

(d) Skimmers or similar devices for the removal of greases, oils and fat-like materials from effluent stream.

b. Examples of eligibility limits.

(1) Any device, equipment and/or facility which is associated with or included in a disposal system for subsurface injection of untreated or inadequately treated industrial or sanitary wastewaters or effluent containing pollutants, contaminants or wastes will not be eligible.

(2) Any device, equipment and/or facility which is associated with, included in, or a part of a system for the disposal of untreated or inadequately treated industrial or sanitary wastewaters or effluent containing pollutants, contaminants or wastes by means of an outfall to a lake, stream, estuary, the ocean, or a municipal treatment facility will not be eligible.

(3) In-plant process changes which may prevent the production of pollutants, contaminants, wastes, or heat, but which by themselves cannot be said to remove, alter, dispose, or store pollutants, contaminants, wastes, or heat, will not be considered eligible for certification as a water pollution control facility.

5. Forms and Procedures.

The regulations themselves attempt to make clear how paperwork pertaining to certification will flow. Application forms are presently being prepared for certification of air and water pollution control facilities. These will be cleared by the Office of Management and Budget, and the final version will be furnished immediately to all Regional Offices.

Your attention is invited to the fact that certification by the cognizant state agency is a prerequisite to federal certification. It is comtemplated that the facts contained in the taxpayer's application, plus the certification from the state agency, will form the basis for EPA certification. By heavily relying on the state's certification, the administrative task of the Regional Offices can and should be minimized. It is not contemplated that on-site inspection will be necessary or desirable in the vast majority of cases. Exceptions to the foregoing must of course depend on the exercise of sound judgment by Regional Office personnel.

Of obvious relevance to the exercise of such judgment would be: the volume and toxicity of the discharge sought to be controlled by the facility in question; the amount of money at stake; experience on the basis of which it may be said that the certifying state agency is in fact ignoring obvious violations of applicable water or air quality standards.

Finally, it should be noted that certification of a facility does not constitute the personal warranty of the certifying official that the conditions of the statute have been met; as is the case with a ruling from the Internal Revenue Service itself, EPA certification is only binding on the Government to the extent the submitted facts are accurate and complete.

§ § § § § § §

TITLE: Eligibility of Solid Waste Compaction Facilities for Rapid Amortization Under section 169 of the I. R. C.

DATE: November 16, 1971

We have considered your memorandum of October 26, 1971, asking our opinion as to the eligibility of solid waste compaction facilities for rapid amortization under section 169 of the Internal Revenue Code. Specifically, Metropolitan Life asks for certification of its compactors installed as replacements for incinerators in 122 apartment buildings in New York City.

We have concluded that such facilities are not eligible for rapid amortization, notwithstanding that their use may prevent air pollution which would occur if the solid waste in question were incinerated. The question is a close one and was resolved last spring only after exhaustive research and discussion. We do not believe the Congress intended that facilities be certified simply because they do not cause pollution that would be caused by the use of a different process. For this reason, sections 2d and 3b(1) were included in the guidelines published at 36 F.R. 19132 (September 29, 1971).

In taking this position, we were influenced by the fact that there is almost always another, "cleaner" way of performing a particular step in a commerical process. As we read the legislative history of section 169, however, it was not the intent of Congress to give the write-off to a facility whenever its function might be performed by a different facility that creates more pollution (or pollution of a different kind). To illustrate the complexities that would arise were we to agree with the argument of Metropolitan Life, we note that in the very case they raise, they would avoid the production of air pollution whether or not they installed compaction facilities, as long as they did not incinerate; if we accepted their argument, therefore, we would also be required to certify the Dempster Dumpster, trucks, etc., that they used to handle the solid waste would otherwise be burned.

While we sympathize with the position of Metropolitan Life, we note in conclusion that the arguable unfairness to it and other companies similarly situated was pointed out to, and rejected by, the Congress. It has also been the source of adverse commentary on section 169 in the academic literature.

ANTI-TRUST

TITLE: Anti-trust Exemption for Pollution Control

DATE: November 5, 1971

We have considered the Commerce Department proposal contained in your October 28 memorandum and have concluded that there is no need for legislation authorizing waiver of antitrust laws to permit cooperative development of pollution control technology.

The question at the heart of this matter is: Are efforts to control pollution slowed by the dictates of the antitrust laws? Our answer is that, with the possible exception of automobile manufacturers, pollution control efforts are not slowed - or, at least, not sufficiently to warrant any waiver.

We have failed to uncover any instance where it can be said with assurance that cooperative research would accelerate the solution of pollution problems. The one possible exception to this statement is the automobile industry, which is probably sui generis because of unusually long manufacturing lead time requirements. In the automobile industry, limited collaborative arrangements have been approved by the Justice Department pursuant to a consent decree entered against the major United States manufacturers. At this time, the process of ad hoc approval of limited arrangements under the consent decree appears to provide an adequate legal basis for meeting the industry's special problems.

With respect to other industries subject to environmental standards, competition creates challenging incentives. This competition produces a desirable diversity in the assessment of business and engineering risks associated with commercial application of scientific and technical knowledge.

Creation of a statutory procedure to allow collaborative arrangements would, in our judgment, tend to diminish incentives and suppress diversity.

At the very least, we believe that the proponents of antitrust exemptions must present the facts to support their proposals. Only then can serious consideration be given to such a major adjustment in antitrust policy.